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CLERK

IN THE

Supreme Court of the United States

October Term, 1944.

No. 440

MAX GOLDBERG,
Petitioner,

vs.

RECONSTRUCTION FINANCE CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI.

Petitioner, Max Goldberg, the defendant and appellant below, files this petition for the issuance of a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit, to review its judgment, modifying and affirming the judgment of the District Court of the United States against the petitioner in the sum of $18,787.88 plus 5% interest from July 8, 1941, to the end that its judgment may be reversed and set aside.

Summary Statement of the Matter Involved.

On December 17, 1943, the District Court entered a summary judgment against petitioner, Max Goldberg, an alleged beneficial owner of Bank Stock, for $18,787.88, plus

interest at 5% from May 1, 1937, the date of the entry of a judgment against the registered owner of the bank stock, Robert W. Martin. The bank stock consisting of 930 shares were purchased by a Syndicate, wherein Petitioner was one of the three trustees and one of many shareholders. The bank stock was purchased with funds of the Syndicate, by the Syndicate and for the Syndicate, and was registered in the name of Robert W. Martin, its agent. The judgment against Goldberg was based on his subscription for 187.8788/10.000 of the shares in the Syndicate, a valid Illinois trust, and on the theory that as a "share-holder" of the "trust", he was the beneficial owner of the *pro-rata* fraction shares of the 930 shares of bank stock which was registered in the name of Robert W. Martin.

The Court of Appeals held that due to the fact that there was a *bona fide* dispute as to the basis of a claim, respondent was not entitled to interest from the date of the judgment against Martin; that it was in "doubt" whether under the Illinois law interest was allowable from the date when the suit was filed, July 8, 1941, or from the date of the entry of the judgment, December 17, 1943. The Court of Appeals resolved the doubt against the Petitioner and modified the judgment to bear interest from July 8, 1941.

Theory of Liability:

The theory of the Petitioner's liability is completely different from any theory heretofore advanced to impose the superadded stockholders' liability against one who was neither the "record" nor the "equitable" owner of the Bank Stock.

In each case where such a liability was imposed there was *no dispute* that the defendant was the *beneficial owner*. Here, Petitioner *was neither the record nor beneficial owner*. Martin, against whom the judgment was entered

on May 1, 1937, was the record owner. *The beneficial owner was a "Syndicate"*, a "Massachusetts Trust", the validity of which is well established in Illinois and conceded by the Court. Petitioner was one of the "Trustees" and one of the "Shareholders". His *alleged* beneficial ownership is on a *far-fetched* theory that as a "Shareholder" of the "Trust" (the beneficial owner of the stock) he, the Petitioner, *was the beneficial owner of the Bank Stock for his pro-rata interest* in the shares of the "Trust" and he was, therefore, liable.

Inconsistent Remedies:

Respondent was *not certain* as to its "remedies" or "claims". Its complaint was founded on *three inconsistent* theories: (1) that as a "shareholder" defendant was liable for his *pro-rata* interest in the sum of $18,787.00 (R. 36), the amount of the judgment; (2) that he is liable as a "partner" (R. 37) on the theory that the trust was *invalid* or (3) as a "Trustee" of a valid trust, for alleged failure to limit his liability. Under the latter two remedies the defendant's liability would have been for the full amount of the balance due on the 930 shares, the sum of $41,706.01 (R. 110). The judgment, however, is based on the *first theory* that the defendant as "Shareholder" of the trust was individually liable for his pro-rata interest in the trust.

The Important Facts.

The syndicate: The Syndicate Agreement is conceded by the opinion (R. 164) to have constituted a valid trust under the Illinois law. It was executed by David E. Shanahan, Max Goldberg and Frank L. Webb, called "Managing Committee" and those signing the agreement called "Syndicate Members". It provided that the Managing Committee was to hold "legal title" to all funds and property "as Trus-

tees" for the use of the Syndicate Members "as beneficiaries of such trust". The name of the "Trust" was "Illinois Securities Syndicate". Its purpose was "for the acquisition and disposal of stock for the account of the Syndicate". The "entire management" of the Syndicate and its properties was (R. 45) in "the Managing Committee" with power to purchase and sell "in their own sole discretion". They were authorized to employ "agents" as they "may deem necessary". The Managing Committee was authorized (R. 46) to use such "agency" as in "their discretion from time to time may be necessary or convenient to carry out the purposes of the Syndicate", including the right to register the stock "in the name of such person" as it may from time to time determine.

It was provided in paragraph 7 of the Syndicate Agreement (R. 47):

> "Neither the members of the Managing Committee nor the Syndicate Members shall be personally liable for any debt incurred or for any contract or undertaking made by the Managing Committee, as such, or by any agent or attorney acting on behalf of the Managing Committee. In every written contract or undertaking entered into by the Managing Committee reference shall be made to this agreement and such contract or undertaking shall provide that the person, firm or corporation so contracting with the Managing Committee shall look only to the funds and property held by them under this agreement as security for the performance of said contract or undertaking and for the payment of any debt, damage, judgment or decree, or of any money that may become due and payable in any way by reason of the execution of such contract or undertaking."

It was also provided in paragraph 10 (R. 48):

> "The Managing Committee may use such corporate, trust or agency forms of organization or operation as in their discretion from time to time may be necessary

or convenient to carry out the purposes of the Syndicate, the certificates of stock or of interest in any such corporation or trust to be held in the name of such person or persons for the account of the Syndicate as the Managing Committee may from time to time determine on."

Purchase of Bank Stock:

This Syndicate purchased 1,000 shares in June 1929 from the Subsidiary of the Bank at \$650 per share. It paid \$200,000 in cash and for the balance of \$450,000 it executed a collateral note secured by the bank stock, signed by the trustees as "Syndicate Managers" and "*not individually*" (R. 99). Payments were made on the account of note with checks drawn on the Bank from the Syndicate account similarly signed by the trustees as "Syndicate Managers" and "not individually" and a copy of the syndicate agreement was lodged with the bank.

Respondent was not a creditor of the bank until July 25, 1931 (R. 5), and it did not extend credit on the financial status of the petitioner. There was no contractual relationship between petitioner and respondent. The bank stock remained registered in the name of Robert W. Martin when the stock liability accrued, and it remained in the possession of the subsidiary of the bank as security for the unpaid balance (R. 99).

The Syndicate was created to purchase stocks and bonds and to deal in securities generally (R. 44). The 930 shares of the bank stock was but a small fraction of the 14,000 shares outstanding so that the Syndicate had no control over the bank.

Dividends on the stock were paid to Martin and by him paid over to the Syndicate. Petitioner invested \$100,000 in the Syndicate and together with the investments of other shareholders the investment exceeded \$500,000 (R. 84, 85).

The Summary Judgment:

On June 18, 1937, after taking the judgment against Martin, respondent ascertained all of the facts concerning the Syndicate. No steps to collect the judgment from petitioner was taken until July 8, 1941, and there was collected under the Martin judgment $50,727.33 (R. 84). The court entered the summary judgment for $18,787.88 plus 5% interest from May 1, 1937 without deciding on which of the inconsistent causes of action it entered the judgment nor what theory it allowed the interest.

The Affirmance:

The Court of Appeals conceded that the Syndicate Agreement constituted a valid trust under the Illinois law and that the Federal law was inapplicable and the case must be controlled by the Illinois law. It also conceded that if a corporation had purchased the 930 shares in the name of Martin, neither the stockholders of the corporation nor its directors could have been held liable individually. It held, however, that a different rule applied to a trust and that its share-holders and trustees are personally liable.

The Questions Presented.

1. Whether under the Illinois law there is a distinction between share-holders of a valid trust and stockholders of a corporation so that shareholders of a trust are deemed owners of the bank stock which the trust purchased with its funds for its benefit in the name of a nominee, while shareholders of a corporation are exempt from liability on a similar purchase by a corporation.

2. May the liability of the petitioner be justified on the theory that petitioner was liable trustee in the face of a

a provision contained in the trust agreement exempting the trustees from personal liability there being no contractual relationship between the petitioner and the respondent and the bank with whom any contractual relationship was made had knowledge of an exemption from personal liability?

3. Whether rule (8)(e), permitting the joinder of inconsistent claims eliminated the substantive law of Illinois requiring an election between inconsistent causes at the trial and whether the election to take the judgment based on one of the inconsistent causes, that petitioner's liability was that of a share-holder, may be sustained on the other inconsistent cause, that he was liable as a trustee?

4. Whether Rule 54(d) applies to a summary judgment as to enable a party to recover on one theory and to urge the affirmance of judgment on a different and inconsistent theory.

5. Whether the federal decisions that there may be two concurrent judgments (1) against the registered owner and (2) against the beneficial owner run counter to the latest decisions of Illinois to the effect that there can only be one judgment under the Illinois constitution on a stockholder's liability.

6. Even if petitioner be considered as the beneficial owner of the bank stock, was it proper to join him as a defendant on July 8, 1941 after plaintiff had elected to hold the registered owner personally liable and obtained judgment against him on May 1, 1937 with full knowledge of the fact that he was a mere nominee, in view of the recent decisions of the Illinois courts?

7. Was it proper to allow interest under the Illinois law from July 8, 1941 when the complaint did not allege any facts justifying such allowance and the motion for a summary judgment did not ask for the allowance of any

interest and where no demand was ever made for the payment of the principal, and there was a bonda fide dispute as to liability?

8. Whether the court properly entered the summary judgment in the face of factual issues which were raised by the pleadings?

9. Whether it was the duty of the court to sustain defendant's motion to rule on respondent to file its election on which of the inconsistent remedies it relied for the summary judgment.

10. Whether it was the duty of the court to sustain petitioner's motion to dismiss the complaint for want of equity.

Reasons for the Allowance of the Writ.

1. The Circuit Court of Appeals has decided an important question of local law in conflict with applicable Illinois decisions and with the decisions of this court, in that it held:

(a) That share-holders of a valid Investment Trust are liable for bank stock which the trust purchased with its funds for the trust in the name of its nominee, when no segregation of the bank stock was ever made among the share-holders of the trust, and when the stock was still held as collateral security for an unpaid balance, and the dividends were not distributed to the share-holders individually but to the trustees of the trust for the benefit of the trust, and when the bank stock was merely part of the securities which the trust held among other securities.

(b) While under the Illinois law share-holders of a corporation would not have been held individually liable on a similar purchase of bank stock, share-holders of a valid trust are liable.

2. The Court of Appeals has decided an important question of great public interest contrary to the accepted

State and Federal law, and created confusion and chaos in relation to the law of trust, undermining the foundation of the entire structure of trust investments, when it held:

(a) That persons who were never stock-holders of a bank were liable on the superadded stock-holders liability for the pro-rata investment in the shares of the trust to the extent of the bank stock which the trust held in its portfolio.

(b) That share-holders of a valid trust are owners of the stock purchased by the trustees for the trust, as distinguished from stock-holders of a corporation who are not deemed to be the owners of the stock which the corporation holds in its treasury.

3. The Court of Appeals misconstrued the meaning and intent of the new Federal Rules in that it held:

(a) That the substantive law of Illinois requiring an election between inconsistent remedies at the trial was abrogated by rule 8(e), permitting inconsistent pleadings.

(b) That a choice to take judgment on one of the inconsistent remedies was no bar to the affirmance of the judgment on another inconsistent remedy, in an absence of a cross appeal.

(c) That under rule 54(d), a plaintiff may move for a summary judgment on one theory and seek to affirm the judgment on a different theory.

4. The Circuit Court of Appeals refused to follow the rule in *Erie* v. *Thompson* in that it held:

(a) That there may be two concurrent judgments on the same bank stock and refused to follow the recent decisions of Illinois.

(b) That bank stock purchased by a valid trust is not the property of the trust but is the property of the individual share-holder prior to the dissolution of the trust and the division of the assets.

(c) That trustees of a valid trust who exempt themselves from personal liability were nevertheless personally liable to a creditor with whom they entered

into no contractual relationship and with whom they had no dealings and who did not extend credit on the faith of any contract with such trustees.

5. The decision is not in harmony with the Illinois law with the decisions of other circuits and with the decisions of this Court. It subjects all investments in trusts to the risk of personal liability and undermines the entire system of trust investments which are founded on limited liability to the same extent as corporate investments and such a decision deserves a review by this Court.

Prayer for Relief.

Petitioner prays that this petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit may be granted, and that upon a final hearing the judgment of the United States Circuit Court of Appeals for the Seventh Circuit be reversed with directions to set aside the judgment entered by the District Court, and that the costs be taxed against the respondent.

Max Goldberg,
Petitioner,

Meyer Abrams,
Counsel for Petitioner.

Shulman, Shulman and Abrams,
Of Counsel.

BRIEF IN SUPPORT OF PETITION.

Jurisdiction Invoked.

The jurisdiction of this court is invoked under judicial code Section 240(a), 28 U. S. C. A., Section 347(a) as amended by the Act of February 13, 1925. The judgment below was entered on June 28, 1944 and rehearing was denied on August 1, 1944.

Opinion Below.

The opinion of the Circuit Court of Appeals for the Seventh Circuit, modifying and affirming the judgment of the District Court is not yet reported. It appears in the printed record at page 160.

A Statement of the Case.

The Complaint.

After the entry of the judgment against Robert W. Martin, the registered owner, on May 1, 1937, plaintiff joined the defendant, Max Goldberg, by an amendment to the complaint filed July 8, 1941 (R. 33).

The first remedy was on the theory that defendant was a "shareholder." It was alleged that the defendant and others were the beneficial owners of the 930 bank shares because they were members of a "Managing Committee", and "subscribers" to the shares of the Syndicate. The Managing Committee purchased the 930 shares for the Syndicate, paid for them with its funds, and registered them in the name of Martin, its nominee, against whom the plaintiff procured judgment on May 1, 1937 in the sum of $93,000.00. Defendant Max Goldberg subscribed to 187-

88/10,000 shares of the Syndicate (R. 36) and he was liable for his pro rata interest in the Syndicate as evidenced by his subscription to its shares.

A second remedy was sought on the theory that defendant was a "partner" and he was, therefore, liable for the balance of the "whole" debt on the 930 shares (R. 37).

A third remedy was sought on the theory that, as a member of the Managing Committee," the defendant was a "trustee" and was personally liable for the balance due (R. 38).

The Defense.

The defendant moved to dismiss the complaint for want of equity (R. 91), and also filed an answer (R. 87) consisting of several defenses: (1) Denying (R. 97) that he was the beneficial owner of any of the stock and setting forth the facts (R. 88-89) showing that the Syndicate was a valid Trust under the Illinois law; that the Trust was the beneficial owner, and not the defendant; that the defendant was not liable either as a "shareholder", "partner" or "trustee" because of the provisions in the Trust Agreement exempting him from any personal liability of which provisions the plaintiff had notice; (2) that plaintiff elected to hold the registered owner liable when it knew that he was a mere nominee for the Syndicate, and the proceedings commenced July 8, 1941 were without jurisdiction (R. 89); (3) that plaintiff had heretofore elected to exercise the first remedy and thereby released the other two inconsistent remedies (R. 90); (4) that it was guilty of laches in delaying the action for four years after it knew of the alleged beneficial ownership of the stock by the members of the Syndicate, and permitted defendant's position to be changed (R. 90); and (5) a release by reason of compromise with other members of the Syndicate (R. 91).

Plaintiff's Motion.

Plaintiff's motion for summary judgment was based on depositions, affidavits, interrogatories and answers thereto, admissions to request for admissions and on the pleadings (R. 83).

Defendant's Motions.

The defendant moved to strike the deposition and the affidavits (R. 137) which the court overruled. Defendant also moved for a rule on the plaintiff to file its election on which of the three inconsistent remedies it moved for the summary judgment (R. 94). No such election was ever filed.

The Hearing.

Defendant stated at the hearing that he served notice asking the plaintiff to admit certain facts or that in lieu thereof he would ask for leave to "offer proof" (R. 106). The court inquired what the admissions were, and defendant stated (R. 107) that the admissions would show that when the Syndicate bought the Bank Stock, the checks given in part payment were signed by the members of the Managing Committee as "Trustees" and "not individually". The court inquired "Where are the checks?" The answer was, "I have the evidence here". On inquiry by the court whether plaintiff would agree on such facts (R. 108), the answer was, "Yes". Plaintiff also said that for "the purpose only of the motion" that if defendant should ask "that this notice should stand as an amendment to his amended answer that it could so stand", and defendant agreed to this. The request for the admissions (R. 98) was then allowed to stand as a further amendment to the amended answer (R. 108).

Defendant's counsel urged at the hearing for a ruling on the motion to require the plaintiff to elect on which of the inconsistent remedies it relied on its motion for the summary judgment, prior to the argument on the merits (R. 102). He asked the court to rule on the motion to strike (R. 104). He also called the court's attention to the factual issues raised by the pleadings, including the factual issue of the defense of *laches* (R. 121), and asserted that the court was without power to enter summary judgment in the face of the factual issues.

The court overruled all of defendant's motions, and permitted the plaintiff to argue the motion for the summary judgment without requiring it to file its election (R. 102). At the conclusion of the argument it asked plaintiff's counsel (R. 132) whether he was sure that there were no factual issues as contended by the defendant, and when he replied in the negative (R. 133) and asked the court to enter judgment for $18,787.88 plus interest from May 1, 1937 and handed the court the draft order, the judge stated that if plaintiff's counsel was "satisfied that there are no factual controversies" he would sign the order, and when plaintiff's counsel answered that he "checked on that" the judge signed the judgment order.

The Summary Judgment.

Without any pleadings to support the allowance of interest from May 1, 1937 to December 17, 1943, without any request in the motion for a summary judgment, without any basis for the allowance of the interest, and in the face of the factual issues which were raised by the defenses, the court entered the judgment requested by the plaintiff on December 17, 1943, holding the defendant liable in the sum of $18,787.88, plus interest at 5% from May 1, 1937, which interest amounts to $6,228.31 (R. 138).

The Modification of the Judgment.

The Court of Appeals held that under no theory could it sustain the allowance of interest from May 1, 1937, because no demand was ever made on the petitioner to pay any part of the claim and there was a *bona fide* dispute as to the entire liability. There was "doubt" in the Court's mind whether in such a case interest was allowable from the date of the filing of the suit, July 8, 1941, or from the date of the judgment, December 17, 1943, and it cited the latest Illinois decision that interest was only allowable from the latter date. However, it resolved the doubt in favor of the allowance of interest from the filing of the suit on July 8, 1941.

The Court held that while the judgment could only be reconciled with the theory that defendant was liable as a "shareholder" of the "trust," the liability could also be sustained on the theory that he was liable as a "trustee" and the fact that under such a theory the judgment would have been for $41,706.01 instead of less than $18,787.88 was of no importance as this was for the benefit of the defendant.

The Rehearing.

The opinion of the court was filed on June 28, 1944. It stated that it doubted whether the three causes based on the liability (1) as a "shareholder," (2) as a "partner" and (3) as a "trustee," were inconsistent, but if they were, it was no obstacle to the judgment because under Rule 8(e)2 it was permissible to join inconsistent causes. While it was "plain" that the judgment was on the theory that the defendant was liable as a shareholder because otherwise the judgment would have been in excess of $41,000, yet if the liability cannot be sustained on the first cause, it could be sustained on the third cause. Petitioner filed a petition for rehearing raising the following points:

I. ILLINOIS DOES NOT DISTINGUISH BETWEEN STOCK OWNED BY A TRUST AND STOCK OWNED BY A CORPORATION OR BETWEEN THE LIABILITY OF SHAREHOLDERS OF A TRUST AND STOCKHOLDERS OF A CORPORATION.

II. SHAREHOLDERS OF A VALID TRUST NEED NOT EXEMPT THEMSELVES FROM PERSONAL LIABILITY AND THE COURT ERRED IN CONFUSING THE REQUIREMENT OF TRUSTEES TO EXEMPT THEMSELVES FROM PERSONAL LIABILITY WITH THAT OF SHAREHOLDERS WHO ARE NOT REQUIRED TO DO SO.

III. THE JUDGMENT CANNOT BE SUSTAINED ON THE THEORY THAT GOLDBERG WAS LIABLE AS TRUSTEE.

(a) There was no contractual relation between Goldberg and the plaintiff.

(b) The declared public policy of Illinois is not to hold trustees personally liable for the debts of the trust estate.

(c) The cause of action against Goldberg as Trustee was abandoned by the judgment.

(d) Plaintiff knew that the trustees exempted themselves from personal liability and the court misconceived the record when it stated otherwise.

IV. THE SUFFICIENCY OF THE DEFENSE OF LACHES AND THE TRUTH OF THE ALLEGATION CANNOT BE CHALLENGED BY A MOTION FOR A SUMMARY JUDGMENT NOR MAY A COURT SUSTAIN A SUMMARY JUDGMENT ON THE GROUND THAT THE DEFENDANT COULD NOT HAVE PRODUCED EVIDENCE TO ESTABLISH THE TRUTH OF THE DEFENSE.

V. A COURT MAY NOT ADJUDICATE THAT ONE IS THE ACTUAL OWNER OF STOCK AND RESERVE JURISDICTION TO ADJUDICATE THAT SOMEONE ELSE IS THE ACTUAL OWNER OF THE STOCK.

VI. THE ALLOWANCE OF INTEREST FROM THE FILING OF THE SUIT IS IMPROPER UNDER ILLINOIS LAW.

The petition for rehearing was denied (R. 203).

SPECIFICATION OF POINTS RELIED ON.

The following points are relied on for reversal:

1. The court erred in overruling defendant's motion to require the plaintiff to elect on which of the three inconsistent remedies it based its motion for summary judgment.

2. The court erred in overruling defendant's motion to strike certain parts of the amendment to the complaint.

3. The court was without jurisdiction to proceed with the hearing on the summary judgment because of the failure of the plaintiff to elect on which of the inconsistent causes of action it relied, and because of the factual questions involved in the case.

4. The court erred in overruling defendant's motion to exclude from the record the affidavits and the depositions excepting such parts which were admitted by the defendant.

5. It was the duty of the court to follow the Illinois law and to hold that after the plaintiff elected to hold the record owner personally liable, with knowledge of the fact that he was a mere nominee for others, it was in no position to maintain an action against the defendant as the alleged beneficial owner.

6. The court erred in holding the defendant liable on the theory that the Syndicate Agreement made the beneficiaries of the Syndicate individually liable. It was the duty of the court to hold that the members of a valid Trust were not individually liable, and that the defendant, Max Goldberg was, therefore, not liable to the plaintiff, and the judgment entered against him is clearly erroneous.

7. The court erred in holding the defendant liable because of his position either as a member of the Managing Committee or as a subscriber to the Syndicate, as under

no theory was he liable in view of plaintiff's knowledge of defendant's limited liability.

8. The court improperly allowed interest from July 8, 1941 when no pleading was on file requesting such interest, and no demand for payment was ever made from 1937 to 1941 and there is no theory upon which interest may be allowed.

9. It was the duty of the court to sustain the several defenses and to hold the defendant, Max Goldberg, not liable.

10. The issues raised by the pleadings involved factual questions, and the court was without jurisdiction to enter summary judgment and deny the right to trial on the factual questions.

11. The defendant, Max Goldberg, was not liable either as a beneficiary of the Trust nor as a member of the Managing Committee, for the stock was never purchased in his name individually and he was neither the record nor the beneficial owner, and, therefore, it was the duty of the court to find the issues for the defendant, and to assess the costs against the plaintiff.

12. The complaint as amended failed to state a cause of action on any of the inconsistent remedies, as the defendant was neither the actual nor beneficial owner of the bank stock, and he was not liable as a shareholder, trustee, or partner, and the court clearly erred when it refused to sustain defendant's motion to dismiss, and the affirmance of its judgment should be reversed.

SUMMARY OF ARGUMENT.

I.

The Court of Appeals Refused to Follow the Substantive Law of Illinois When It Decided That Shareholders of a Valid Trust Are Personally Liable for Bank Stock Which the Trust Held in Its Portfolio Among Other Securities, as Distinguished From Shareholders of a Corporation Who Are Not Liable Under a Similar Situation, and Its Judgment Was Contrary to the Decision of This Court and Is in Conflict With Decisions of Other Circuits.

(a) Shareholders of a valid trust are not personally liable for the contracts of the trustees of the trust and the judgment against Goldberg for $18,787.88 plus 5% interest from July 8, 1941 cannot be sustained under the Illinois law.

(1) Shareholders of an Investment Trust Which Holds Some Bank Stock Among Diversified Securities in Its Portfolio Are Not Liable for the Bank Stock Under the Recent Decision of This Court.

(2) The Syndicate as an Investment Trust Merely Held a Small Portion of the Bank Stock in Its Portfolio and Did Not Control the Bank.

(3) The Test Whether One Is a Real Owner of Bank Stock Is Determined by the Fact Whether He Has the Power to Direct the Record Owner to Transfer All Shares to Him as the Real Owner, and Defendant Had No Such Power to Direct Martin to Transfer the Shares in His Name.

(4) Under the Illinois Law a Shareholder of a Valid Trust Is Not a Shareholder of the Corporation Whose Stock Is Owned by the Trust and Defendant Was Therefore Not the Real Owner of the Bank Stock.

(5) Shareholders of a Valid Trust Need Not Exempt Themselves from Personal Liability and the Court Erred in Confusing the Requirement of Trustees to Exempt Themselves from Personal Liability With That of Shareholders Who Are Not Required to Do So.

II.

The Judgment Cannot Be Sustained on the Theory That Goldberg Was Liable as Trustee.

(a) There was no contractual relation between Goldberg and the plaintiff.

(b) The declared public policy of Illinois is not to hold trustees personally liable for the debts of the trust estate.

(c) Plaintiff knew that the trustees exempted themselves from personal liability and the court misconceived the record when it stated otherwise.

(1) The Third Party With Whom the Syndicate Contracted Knew That the Defendant Exempted Himself from Personal Liability.

(2) The Facts Which Were Stated in the Answer Were Conceded as True by Plaintiff's Motion.

(d) Having elected to hold the defendant liable on the first inconsistent remedy, and having procured the judgment thereon, and without any cross-appeal, the plaintiff may not sustain the summary judgment on the inconsistent remedy that Goldberg was liable as trustee.

III.

Plaintiff's Election to Take the Judgment Against the Registered Owner With Its Knowledge That He Was a Mere Nominee for Others Operated as a Release of the Defendant Under the Recent Decisions of the Illinois Courts, Contrary to the Earlier Decisions of the Federal Courts.

(a) Illinois has adopted the rule that there can be no second judgment against the beneficial owner after an election to obtain judgment against a record owner.

(1) The Election to Take the Judgment Against Martin With Knowledge That He Was Merely an Agent and Held the Stock for Undisclosed Principals, Operated as a Release of the Alleged Liability of the Defendant.

(2) The Doctrine of Trustee and Cestui Que Trust Cannot Be Invoked to This Case Because Under the Admitted Facts the Relationship Was That of Principal and Agent.

IV.

Defendant's Answer Presented Factual Issues and the Court Acted Without Jurisdiction When It Entered the Summary Judgment.

(a) The defense of laches presented a factual issue.

(b) The ownership of the bank stock raised a factual issue.

V.

A Court May Not Adjudicate That One Is the Actual Owner of Stock and Reserve Jurisdiction to Adjudicate That Someone Else is the Actual Owner of the Stock.

VI.

The Allowance of Interest From the Filing of the Suit Is Improper Under Illinois Law.

ARGUMENT.

I.

The Court of Appeals Refused to Follow the Substantive Law of Illinois When It Decided That Shareholders of a Valid Trust Are Personally Liable for Bank Stock Which the Trust Held in Its Portfolio Among Other Securities, as Distinguished From Shareholders of a Corporation Who Are Not Liable Under a Similar Situation, and Its Judgment Was Contrary to the Decision of This Court and Is in Conflict With Decisions of Other Circuits.

The decision in the instant case that Petitioner, Max Goldberg, as a shareholder of 187.8788/10,000 of the shares of the trust (R. 36) was liable as the owner of bank stock for the identical amount of his pro rata interest in the 930 shares which the trust purchased with its funds for its use in the name of Martin, runs counter to the substantive law of Illinois as well as to the decisions of other Circuits, and is also contrary to the decision of this Court.

(a) Shareholders of a valid trust are not personally liable for the contracts of the trustees of the trust and the judgment against Goldberg for $18,787.88 plus 5% interest from July 8, 1941 cannot be sustained under the Illinois law.

The opinion says (R. 164) that defendant "correctly" stated that the stock liability "must be decided in accordance with the law of Illinois", and *concedes* (R. 166) that "no Illinois court has gone as far in fixing liability upon the stockholders of a corporation" but that it was of the opinion that the Illinois courts would have done so upon similar facts as in *Anderson* v. *Abbott*, 321 U. S. 349. Whether the Illinois courts would have done so as to facts similar to the *Anderson* case is beside the point, because the facts here are *markedly* different.

(1) Shareholders of an Investment Trust Which Holds Some Bank Stock Among Diversified Securities in Its Portfolio Are Not Liable for the Bank Stock Under the Recent Decision of This Court.

The decision of this Court in the *Anderson* case, *supra* (321 U. S. 349) does not hold that a "shareholder" of the "trust" is liable for bank stock held by the trust. The liability in the Anderson case **pivoted** on the point that Banco was a "**Bank-holding**" company which owned "**all**" of the Bank stock and "**controlled**" the Bank. The court **distinguished** such a "bank-holding" company from a company which merely held **some of the bank stock in its portfolio**, saying (p. 358):

> "In substance Banco as a going concern had no free assets which could possibly be said to constitute an adequate reserve against double liability on the bank stocks which it held. **It was in no true sense comparable to an investment trust or holding company which holds bank stock in a diversified portfolio.**" (Emphasis ours.)

This applies on *all fours* to this case. The "investment trust" *held in its portfolio bank stock among "diversified"* securities which it purchased. The Bank stock was but a *small fraction* of the outstanding stock and *did not vest control of the Bank in the "trust"*. There were outstanding 140,000 shares representing a par value of $14,000,000, while the 930 only represented a par value of $93,000. This insignificant fraction of shares *did not vest the trust with the power of control.*

In *Anderson* v. *Abbot*, 321 U. S. 349, this Court cited (p. 366) the article of Magruder in 23 Co. L. Rev. 423 on "The Position of Shareholders in Business Trusts" where he said:

> "Nothing is better understood in the law of trusts than that the trustee is not an agent for the *cestui que trust*. Hence, it ought to be abundantly clear that in a real business trust the beneficiaries are not personally liable to the third persons, either in contract or in *tort*."

He also pointed out that with the exception of one State, all other States "have recognized that a business trust *can* be constituted as to secure limited liability to the shareholders." Illinois is one of the States which *recognized* the *limited* liability.

(2) The Syndicate as an Investment Trust Merely Held a Small Portion of the Bank Stock in Its Portfolio and Did Not Control the Bank.

The trust did not invest all of its assets in the bank stock. There was $495,000 invested in the trust (R. 35). *Only $200,000 of its cash was used for the purchase of the stock* (R. 99) and for the balance it executed its note which is still unpaid. It had in its treasury additional assets of $295,000 as a "reserve against the double liability" of $93,000. In the Anderson case, *supra,* the liability was imposed because Banco invested *all* of its money in the Bank stock (except $25,000) and it left *no free assets* which could possibly be said to constitute "an adequate reserve against public liability on the bank stock which it held". In the instant case, *there was left $295,000.00 to discharge the double liability of $93,000.00.* While on the motion for a summary judgment it must be *conceded* that the trust invested its funds in other securities, we have filed a motion for leave to supply the details of the securities which it held in its portfolio which the Court of Appeals improperly denied (R. 153).

In the Anderson case, *supra,* this Court compared Banco to the status of a "minor" or an "incompetent", and the liability was imposed because a transfer to one that is incompetent is illegal. In the instant case the defendant was *never the owner of the stock,* never made any transfer, and the purchase was not made by him but was made by the "Managing Committee" (R. 42) in their role as "Trustee", and "for the Syndicate", in the name of Martin. Under the decision in the *Anderson* case, *supra,* a person has a right to *exempt* himself from personal liability by

even taking stock in the name of an *irresponsible person* if he is *not an incompetent one*. There, it said (p. 368):

> "Double liability is an incidence of ownership. It had long been held that a stockholder who in good faith parts with all his interest in the shares rids himself of that double liability, even though his transferee is not responsible. *Earle* v. *Carson, supra.*"

There was no contention on petitioner's part that the "trust" was not liable as the beneficiary. *The "trust" was liable* and is responsible. In the Anderson case the former stockholders who controlled the bank "*retained* through Banco their *former investments* in the bank, including *control,* and did *not* constitute Banco as an *adequate* financial substitute in their stead". Here, the defendant *never had any control* of the Bank, and, of course, did ***not retain*** any control. There, this Court said (p. 361):

> "**Normally the corporation is an insulator from liability on claims of creditors.** The fact that incorporation was desired in order to obtain limited liability does not defeat that purpose. *Elenkrieg* v. *Siebrecht,* 238 N. Y. 254. See 7 Harv. Bus. Rev. 496. **Limited liability is the rule not the exception**; and on that assumption large undertakings are rested, vast enterprises are launched, and huge sums of capital attracted." (Emphasis ours.)

This Court found *exceptions* to the rule in the Anderson case to justify the liability on the stockholders *because of the particular facts* applicable to a Bank Holding Company which held **all** of the bank stock and **controlled** it. None of the "exceptions" existed here.

The decision runs counter to the decision in *Nettles* v. *Childs, et al.,* 100 Fed. (2d) 952, where the court said:

> "The proposal that stockholders be held individually liable for the obligations of the corporate body (here the valid Trust) *runs counter to the principle of limited liability which is a fundamental feature of corporate organization.* As applied to stockholders in a holding company, ***the principle normally shields them from the extra statutory liability*** **imposed upon**

bank stock held by the corporation; and recourse against them in recent cases, cited in our decision in *Nettles* v. *Rhett, was allowed only when the stockholders knowingly made use of the corporate form as an instrumentality to evade personal liability, or to save the bank or bring about and control an expansion of its business.* The distinction is emphasized by comparing the decision of the Supreme Court of Michigan in *Burrows* v. *Emery,* 285 Mich. 86, 280 N. W. 120, with its *Fix* v. *Farrell,* 271 Mich. 358, 260 N. W. 886." (Emphasis ours.)

(3) The Test Whether One Is a Real Owner of Bank Stock Is Determined by the Fact Whether He Has the Power to Direct the Record Owner to Transfer the Shares to Him as the Real Owner. Defendant Had No Such Power to Direct Martin to Transfer the Shares in His Name.

The opinion cites *Gahagan* v. *Whitney,* 359 Ill. 419. The Illinois court *did not hold* that a "shareholder" of a corporation or of a *valid* "trust" is the "real" owner of bank stock which the corporation or trust owned. *On the contrary,* it *distinguished* (p. 423) that case from the *Bingham* case on the theory that Whitney was the "real owner" having received *the dividends individually* while Bingham held the stock *in his representative capacity* and could only become the "owner" after the payment of the debts and the closing of the estate, and *he was, therefore, not the real owner.* This is identical to the situation here. *Goldberg had no title to the 930 shares.* The Trust Managers purchased the shares with the funds of the Syndicate for the Trust (R. 42). The 930 shares were not even in possession of the "trust" but were held as collateral for an unpaid balance by the seller (R. 99). The dividends were paid to the Syndicate and not to the shareholders.

Even if Goldberg was the sole beneficiary of the Trust he could not have acquired the shares without paying the balance due on the collateral note and debts of the Trust. However, he was only *one* of the beneficiaries and one of

the five Trustees and *he had no right to transfer the shares to himself.*

The *test* whether one is a stockholder of bank stock is **whether the alleged "real" owner could have "at any time" compelled the registration of the shares in his name** (7 Am. Jur. § 84, p. 72). Such was the situation in *R. F. C.* v. *Pelts*, 123 F. (2) 503 and in *R. F. C.* v. *Barrett*, 131 F. (2) 745 on which respondent relies. "Pelts" and "Barrett" were the real owners as *they could have compelled their nominees to register the stock in their respective names.* Here, the 930 shares, according to the "uncontradicted facts" (R. 42) were purchased by "the Managing Committee" of the Illinois Securities Syndicate "for the Syndicate" and "with funds of the Syndicate". **Goldberg, as one of the Managing Committee or Trustees, or as one of the shareholders of the Syndicate, could not have compelled Martin to register the 930 shares in his individual name.** Goldberg did **not** receive any of the dividends, but the dividends were received by the trustees (R. 50) and the Syndicate obtained the dividends. It is, therefore clearly demonstrated that Goldberg was not the real owner of any of the 930 shares.

(4) Under the Illinois Law a Shareholder of a Valid Trust Is Not a Shareholder of the Corporation Whose Stock Is Owned by the Trust and Defendant Was Therefore Not the Real Owner of the Bank Stock.

The Illinois Law is well settled that *a shareholder in a holding company is not a shareholder of the corporation whose stock is owned by the holding company.* This was squarely decided in *Martin* v. *Central Trust Company*, 327 Ill. 622 where the court says (p. 635):

> "**A stockholder in a holding corporation is not a stockholder in the companies whose stock is owned by the holding company,** but the interest of such stockholder in the holding company is similar to the interest of any other stockholder. (*Sabre* v. *United Traction Co.*, 225 Fed. 601.) (Emphasis ours.)

The shareholder of a valid trust stands in the same position as a shareholder in a corporation (Bogert on Trusts and Trustees § 303).

After conceding this to be the Illinois law, had Goldberg been a stockholder in a corporation, the opinion says (p. 167), that there is "a marked distinction" between "a corporation and a trust", and quoted from the *Schumann-Heink* case to support the distinction between a corporation and a trust. Its *fundamental error* is in not noticing that the distinction which was there made between a "trust" and a "corporation" was *not as to the title* acquired by the trustees of the trust or by the corporation, nor as to the liability of "shareholders" of the trust and "stockholders" of the corporation. The distinction was made between the *function* of "trustees" of a trust and the "directors" of the corporation. On the contrary, the court pointed out that the *title* of the trustees of the trust is *identical* with the title of a corporation, saying "a trust is an estate, the legal title to which is vested in a trustee and the equitable title to which is held by individuals who bear no contractual relation among themselves". This is identical to the "title" of a corporation and as to the relation of stockholders to the corporation, who bear no contractual relations among themselves.

Here, the court is not concerned with the distinction between the functions of "trustees" of a trust and "directors" of a corporation, nor is it even concerned with the interest of shareholders in a trust and stockholders in a corporation. It is only concerned in the *title* to the bank stock. *The title in bank stock is vested in the trustees of a trust to the same extent as it is vested in a corporation.* **The principal question which the court decided is that title to property of a valid trust is vested in the shareholders of the trust and not in the trustees of the trust, as distinguished from the title of a corporation to its**

assets which is vested in the corporation and not in its stockholders. **This is clearly in the "teeth" of the Illinois law.**

In *Rittenberg* v. *Murnighan*, 381 Ill. 267, one of the questions presented to the court was, whether a "shareholder" of a *trust* was the "owner" of the stock which was held by the Trustees of the trust under a provision that the shareholder could have exchanged his share for stock *at his will*. It was the position of the appellant that because the "shareholder" could have exchanged his shares for the stock at his will, he was, in equity, *the stockholder*. This view was *not adopted* by the Supreme Court of Illinois when it said (p. 273):

> "The shares of stock in the trust were issued to the trustees upon the formation of the corporation and **the beneficiaries have never had title, ownership, or possession of the shares.**"

and when it further said (pp. 274-275):

> "In the present case, **the holders of the trust certificates never were shareholders of the corporation**, and therefore, there was no separation of the voting power from the ownership of the shares." (Emphasis ours.)

Two days after the court decided in this case that under the Illinois law shareholders of a valid trust are owners of the stock held by the trust, the Appellate Court of Illinois rendered its decision in the *Rittenberg* case (to whom the case was transferred by the Supreme Court Case No. 42565, not yet reported), in which it held that Rittenberg, as a "shareholder" of the trust, was *not a "stockholder"* of the corporation whose stock was owned by the trustees of the trust, saying:

> "By the terms of the trust agreement, the certificate holders could withdraw from the trust at any time and upon surrender of the trust certificates, obtain stock of the whole company."

After pointing out that prior to such exchange the trustee had "the full legal title to all corporate stock held by them" it said:

> "Had the plaintiff been a stockholder of the corporation, he might claim and exercise a derivative right of action against the corporation",

but

> "Plaintiff *not being a stockholder* could not exercise the right of suing in a derivative action for and on behalf of the corporation".

In disposing of the objection that the corporation failed to give notice to the stockholders as required under the statute in connection with the sale or lease of the major part of its property and in holding that a notice was not necessary or required because Rittenberg was merely a *"shareholder" in the trust and not a "stockholder" in the corporation,* the court said:

> "However, the plaintiff is in no position to raise the question as to this informality because *he is not a stockholder of the corporation.*" (Emphasis supplied.)

The *Rittenberg* case is a much stronger case, because there, *Rittenberg could have demanded at his will the exchange of the stock for the shares* and he would have become the "owner" of the *identical* stock, while here, Goldberg *could not have exchanged his certificates in the trust for the bank stock,* as there was no segregation of the bank stock among the shareholders of the trust. The bank stock was an *asset* of the trust which had to be applied towards the payment of its debts upon dissolution, and the bank stock was not in the possession of the trust but was held as *collateral* (R. 99) for the payment of the $450,000 *collateral* note which was reduced to $400,000 so that *the trust was not even possessed of the bank stock*:

The test of equitable ownership of stock is the *power*

to direct the exchange and to direct the "vote" (7 Am. Jur., Sec. 84, p. 72).* The Illinois courts held that even though such power of direction existed yet the "ownership" of the shares in the "trust" was *not identical* with the ownerhsip of the "stock" *prior* to the execution of the direction. The 930 shares of Bank Stock *were not segregated* for the individual shareholders on the basis of the pro-rata shares which they held in trust. The 930 shares remained in the name of Martin for the use and benefit of the *entire syndicate*, the Trust. The situation was the same as in *Potter* v. *Mortimer*, 114 Ill. App. 422, where the liability was denied. The court there said (p. 426):

> "Under the terms and conditions of this will *this bank stock did not become segregated*, but remained a part of the general estate of the deceased. It follows that the estate of the widow was not liable for the assessment; and therefore the fact that no claim was filed against her estate is immaterial."

The fact that there the bank stock was part of the "general estate" by "will" and here it was part of the general assets of the trust by the trust agreement, is of no importance. It is the "voting" rights, or the power to direct the vote that determines ownership. This can only be done after "segregation" and not while it is held in bulk (*Potter* v. *Mortimer*, *supra*).

The decision is in direct conflict with the decision in *Laurent* v. *Anderson*, 70 F. (2) 819. There the court said (p. 822):

> "We may assume that in the case of a strict trust, in absence of a statute or an express agreement to the contrary, the trustee * * * and not the beneficiary is liable for individual liability against stockholder."

* This point was not raised in *Anderson* v. *Abbott*, 321 U. S. 349, and we believe that if the point was raised the decision might have been different.

The court cited *Taylor* v. *Davis*, 110 U. S. 330 in support of its statement. There the court said (p. 338):

> "A trustee is not an agent. An agent represents any acts for his principal. A trustee may be defined generally as a person in whom some estate, interest, or power in or affecting property is vested for the benefit of another * * *. When a trustee contracts as such, unless he is bound no one is bound, for he has no principal * * *. If a trustee contracting for the benefit of a trust wants to protect himself from individual liability on the contract, he must stipulate that he is not to be personally responsible, but that the other party is to look solely to the trust estate."

The doctrine that a trustee is not an "agent" and cannot bind the beneficiaries because they are not his principals was adopted by the opinion in *Schumann-Heink* v. *Folsom*, 328 Ill. 321, *supra,* on which the court relies to hold the beneficiaries of the trust liable for the alleged contract of the trustee.

The identical question was decided adversely to the decision in the instant case in *Anderson* v. *Abbott*, 321 U. S. 349, 64 S. Ct. 531, where the court *distinguished* Banco from a trust saying (p. 358):

> "It was in no true sense comparable to an investment trust or holding company, which holds bank stock in a diversified portfolio."

It is, therefore, clearly shown that there is no distinction between ownership of bank stock by the trustees of a valid trust and ownership thereof by a corporation concerning the liability of the *shareholders* of the "trust" and the "stockholder" of the corporation.

The reasoning for the non-liability of stockholders in a corporation is *identical* with the reasoning of non-liability of shareholders of a valid trust, as stated in *Nettles* v. *Childs, et al.*, 100 F. (2) 952, and *Anderson* v. *Abbott*,

321 U. S. 349 because the proposal that stockholders are to be held individually liable for the obligations of the corporate body or trust *runs counter to the principle of limited liability,* which is a fundamental feature of corporate or trust organizations.

If the law, as announced in this opinion be permitted to stand then many investors in large trusts may find themselves and their estates subject to liabilities for bank stock which such trusts have purchased and placed among their *diversified securities.* Such is not the law either in Illinois nor in the federal courts and therefore the writ should be granted.

(5) Shareholders of a Valid Trust Need Not Exempt Themselves from Personal Liability and the Court Erred in Confusing the Requirement of Trustees to Exempt Themselves from Personal Liability With That of Shareholders Who Are Not Required to Do So.

In imposing the liability on Goldberg as a shareholder for the bank stock which was purchased by the valid trust with its funds and for its benefit, the opinion says (R. 165) that the "third party" must have knowledge of the "limited liability" citing, *Review Printing & Stationery Co.* v. *McCoy,* 291 Ill. App. 524, as authority. This case dealt with the *liability of trustees* who failed to exempt themselves from liability and *not with the personal liability of the shareholders of the trust.* No exemption from personal liability is necessary to absolve shareholders from such liability for contracts made by the trustees of the trust. In the *Schumann-Heink case,* 328 Ill. 321, the court did not hold that shareholders of a valid trust are not personally liable because of any exemption clauses in the trust agreement, but it based its decision on the *validity* of the trust, saying:

> "On the other hand, where the declaration of trust gives the trustees full control in the management of

> the business of the trust and the certificate holders are not associated in carrying on the business and have no control over the trustees, that there is no liability as partners."

It is evident therefrom that the non-liability of the shareholders of the trust *is not founded on any exemption clause* but on the *validity* of the trust, because in a valid trust the contracts are executed by trustees having control of the trust and not by the stockholders. In a valid trust, the trustees are the contracting parties as "principals", and *not* the shareholders while in an invalid trust, the trustees act as *agents* for the shareholders as their principals. It is the *rule* in Illinois that *beneficiaries* of a trust are *not liable* for the contracts of the trustees of a *valid trust.* (*Zanis* v. *Hanson*, 302 Ill. App. 404, 410).

Trustees of a Massachusetts trust who purchase bank stock in the name of their agent under the authority vested in them by the trust instrument have no authority to bind the shareholders of the trust to make them stockholders of the bank. Where a trust is valid, the contract is either that of the trustees personally or of the trustees in their representative capacity for the trust estate. Under no legal theory may they bind the beneficiaries of the trust as to make them personally liable on any contract (*Taylor* v. *Davis*, 110 U. S. 330, 338; *Laurent* v. *Anderson*, 70 F. (2) 819, 822, *supra*).

Whether or not trustees of a trust are personally liable hinges on the question whether the third party who entered into a contract with them had knowledge that the trustee did not enter into the agreement personally, but in its trust capacity. The beneficiaries may only be held liable where the trust is *invalid.* The opinion in the instant case is clearly *"at war" with the Illinois law* on this point, in the language of Judge Minton (134 F. (2) 839), requiring an unconditional surrender because the Illinois law is controlling as conceded by the opinion.

II.

The Judgment Cannot Be Sustained on the Theory That Goldberg Was Liable as Trustee.

The opinion says (R. 167) that Goldberg might be liable "as one of the trustees" even if he was not liable as a "shareholder." The *fundamental* error was committed when the court overlooked (1) that there was *no contractual relation* between Goldberg and the plaintiff, and (2) that in the absence of a cross-appeal, the plaintiff cannot recover on a cause of action which *was eliminated by the judgment,* and (3) that there was a specific exemption from personal liability which the plaintiff knew.

(a) There was no contractual relation between Goldberg and the plaintiff.

The theory upon which trustees are held personally liable to "third parties" is founded on the fact that "where the trustee *contracts* he does so for himself, as *he has no principal"* (*Schumann-Heink* v. *Folsom,* 321, 329), and the "third party" enters into the contract with *him* personally, unless he has notice to the contrary. The "third party" *relies* on the personal undertaking of the trustee.

When plaintiff made its loan to the bank, *the contractual relation was that of Martin.* It was *he* who entered into the contract with the "third party", the creditors of the bank, when he obtained the stock in his name (*Golden* v. *Cervanka,* 278 Ill. 409, 441). The plaintiff had *no contractual relation with the defendant* and did *not* rely on his financial standing and according to the opinion had no knowledge of his existence. The entire theory for the rule that a "third party" may hold the trustee liable *on his contract* because of lack of knowledge that he contracts for

the trust, *falls by the wayside,* because (1) there was no contractual relation here and (2) the liability is *statutory* and is not founded on notice or knowledge (*Golden* v. *Cervanka,* 278 Ill. 409, 443).

(b) The declared public policy of Illinois is not to hold trustees personally liable for the debts of the trust estate.

Neither under the National Banking Act nor under the Illinois law may trustees of a valid trust be held personally liable for the debts of the trust estate. The National Banking law exempts trustees from personal liability (*Cont. Nat. Bank & Trust Co.* v. *O'Neil,* 82 F. (2) 650, 653; *Pufahl* v. *Estate of Parks,* 299 U. S. 217, 223). Illinois also exempts trustees from personal liability (Chapter 32, Section 157.23).

In *United States* v. *Earling,* 39 F. Supp. 864, the court said (p. 868):

> "**Illinois likewise has a statute exempting from personal liability, trustees who own bank stock as such.** Illinois Corporation Act, Chapter 32, Sec. 157.23, Illinois Rev. Stats. 1939. **It is therefore the public policy of both States to limit the liability of trustees and of trust companies.**" (Emphasis ours.)

The court was clearly *mistaken* when it said (R. 170) that in *Golden* v. *Cervenka,* 278 Ill. 409, "trustees were held liable for bank stock held in such capacity". The question there was as to the defense of *registered stockholders* who *contended* that they were not liable individually because they held the stock as "executors" and "trustees". The court held that inasmuch as these stockholders had *contracted* for their stock in *their own name* under the Banking Act, they could not defend on the ground that they held the stock for the benefit of estates or trusts. It was as to such stockholders that it said that the liability was controlled by the Banking Act and the Constitution,

and *not* by the General Corporation Act. This has no bearing on the issue whether "executors of an estate" who *were not record stockholders* or "trustees of a trust" who were *not* "registered" stockholders and who purchased the stock in the name of a nominee, were personally liable. The liability of such "executors" or "trustees" is *not* governed by the Constitution, but by the *fact* whether they are deemed to be *actual* stockholders.

The decision of the court that under the Illinois law, "executors" of an estate or "trustees" of a trust cannot take bank stock in their representative capacity and that they are liable individually, *is contrary to the well settled law of Illinois.* This question was decided *adversely* in *Golden* v. *Elwood,* 299 Ill. 73, which suit involved the stock liability which originated in *Golden* v. *Cervenka, supra.* After holding the registered owner liable on the stock in *Golden* v. *Cervenka, supra,* a proceeding was instituted to hold the executors of the estate liable. In holding that they were *not* liable and in referring to Sec. 6 of Article II of the Constitution, the court said (p. 76):

> "This provision only purports to hold stockholders in such liability. *No one but an actual stockholder can be held to such liability.*"

The court further said:

> "The bill is brought for the purpose, alone, of recovering under said section of the constitution from appellees as stockholders. No apt averments are made to charge any other character of liability."

The *precise question* that trustees of a trust are liable in their trust capacity and *not individually,* was decided by the Illinois courts in *Flanagan* v. *First National Bank of Chicago,* 307 Ill. App. 495 and the Supreme Court of Illinois denied leave to appeal.

It is evident from the foregoing that under the Illinois

law, trustees of a valid trust are *not individually liable,* and that the statement of the court that under the Illinois law trustees are liable, is *clearly erroneous.* In *Golden* v. *Cervenka* it was decided that *registered* stockholders cannot absolve themselves from personal liability because of the exemption under the General Corporation Act when they act in a representative capacity such as executors or trustees because *their liability* as "stockholders" is *fixed* by their *subscription* to the stock under the Illinois constitution. This is inapplicable to trustees of a trust or to executors of an estate *who do not place themselves in the capacity of stockholders* by subscribing thereto individually and such parties can only be held liable where the "intent" was to become stockholders individually. Only in the light of such a construction would there be meaning to the decision in *Golden* v. *Cervenka* that the liability of "stockholders" is fixed by the Constitution and not by statute and the General Corporation Act could not relieve such "stockholders" from liability.

The question whether one who is *not* a registered owner is the *beneficial* or *actual* owner is *not a constitutional question* but a *factual* question. The question whether a non-registered stockholder is an actual stockholder under the constitution is a question to be decided by the facts governed by the "intent". *If there is no intention to own the stock individually, there is no individual liability* (*Hood* v. *Commonwealth Trust & Savings Bank*, 376 Ill. 413).

The definition as to who is a stockholder in relation to non-registered stockholders is not a constitutional question and is not violative of the constitutional provision (*Hospelhan* v. *Emerson,* 175 Md. 207, 215). That the definition as to who is a stockholder is not a constitutional question but is a *factual* question was expressly held in *Hood* v. *Commonwealth Trust & Savings Bank,* 376 Ill. 413. There, the Harris Trust & Savings Bank, the trustee of the estate

of Foster S. Nims, *exchanged* the shares that were issued to Foster S. Nims for shares *in the name* of Harris Trust & Savings Bank as "Executor of the estate of Foster S. Nims, Deceased." It was sought to hold the bank liable *individually* and as *executor*. The court said that the question whether the bank was individually liable upon the transfer of the stock was a question whether it was a "stockholder" within the constitutional provision. After referring to *Gahagen v. Whitney*, 359 Ill. 419, 422, and in holding that *the bank was not liable individually*, the court said (p. 426):

> "The only action the appellant bank appears to have taken in reference to the stock was to surrender the certificate which the testator held, to have a new one issued in its name as executor of the Nims estate, and at the conclusion of the administration to transfer such certificate to a beneficiary named in the will. **Each of these acts was in accord with its general duties as executor, and no presumption arises that appellant bank was undertaking to exceed such powers and become the real owner of the stock.** When the bank qualified as executor, it became possessed of the same title in the stock the testator had, and the transfer on the books, under the circumstances shown, did not create in appellant any different title than it possessed prior to the transfer. Furthermore, *there is no evidence indicating the executor intended that the transfer on the books of the bank should create any interest in it other than the interest it had as executor of the estate.*" (Emphasis ours.)

The court referred to its decision in *Golden v. Elwood*, 299 Ill. 73, and pointed out that there an attempt was made to hold the executors of the estate personally liable after the decision in *Golden v. Cervenka*, and it was held that they *were not personally liable*. The court concluded (p. 427):

> "There is nothing in the transfer of the 10 shares of stock to the appellant bank, or in the manner it appears on the books of the bank, which would support a holding of personal liability against the appellant bank, and the chancellor erred in so holding."

The instant case is a much stronger one because *here the trustees took title in the name of an agent* for the benefit of the trust estate *under the express provisions of the trust instrument which authorized them to do so* (R. 46). There was *a clear intent* not to make themselves *personally* liable as stockholders, which "intent" *is the controlling element* for holding a non-registered stockholder not liable (*Lewis* v. *West Side Trust & Savings Bank,* 376 Ill. 23, 42).

(c) Plaintiff knew that the trustees exempted themselves from personal liability and the court misconceived the record when it stated otherwise.

The court misconceived the record when it said (R. 165) that "there is no allegation in the pleadings that at the time such loan or loans were made that it had any knowledge of this provision in the trust agreement". The contrary appears from the record. The first defense *alleged* (R. 89) that plaintiff knew "when it made its loans to the Bank that the trustees of the syndicate were personally exempt from any liability". The facts as to such knowledge were also stated in the notice for request of admissions and which facts were admitted (R. 98-99). Besides, *nowhere did plaintiff allege that it had no knowledge* of the content of the syndicate agreement. On the contrary, its complaint was *founded* on the syndicate agreement (R. 34-35). The request for admissions was also founded on the syndicate agreement (R. 42-43). This being a summary judgment, *any doubt must be resolved against the movant,* the court had to assume that plaintiff *knew* all of the facts, *in absence of allegation or proof to the contrary.* The only thing in the record which tends to show lack of knowledge is the deposition of plaintiff's attorney. This deposition was clearly inadmissible against the defendant on a mo-

tion for summary judgment which the defendant properly moved to strike (R. 132).

The Syndicate Agreement provided (R. 47):

> "Neither the members of the Managing Committee nor the Syndicate members shall be personally liable for any debt incurred or for any contract or undertaking made by the Managing Committee, as such, or by any agent or attorney acting on behalf of the Managing Committee."

The law is well settled that where the *third* party *knew* that the trustee entered into the contract in his trust capacity *with the intent not to be held individually liable* no personal liability can be imposed on such trustee. This was squarely held in *Kramer* v. *Cummings*, 225 Ill. App. 26. There the Court quoted from a Maryland case the following (p. 29):

> "Although one may covenant as Trustee, he may limit and qualify the character in which he is held responsible; and where it plainly appears from the face of the instrument that he did not mean to bind himself personally, the courts will construe the covenant according to the plainly expressed intention of the parties. This, too, in cases where the covenantor had no right to bind himself in a Fiduciary Character".

The court there concluded (p. 30):

> "The same principle would apply on a contract like that at bar, which discloses an intention that the parties should not be personally bound".

In *Commercial Casualty Insurance Co.* v. *Pearce*, 320 Ill. App. 221, an attempt was made to assert personal liability against the trustees of a Massachusetts trust, and in refusing to grant such relief the court said:

> "Appellant claims that the failure to include words of limitation of liability in the application for the bond estops appellees from asserting that appellant had knowledge of the trust, and makes the trustees personally liable."

In holding adversely to the contention, the court said (p. 228):

"* * * it was held in *Equitable Trust Co.* v. *Taylor*, 330 Ill. 42, under the doctrine in *Seebarker* v. *McCormick*, 178 Ill. 404, that *as both parties were cognizant of the facts as to the trustee's authority, the trustee was not personally liable either ex contractu or ex delicto.*"

In *Rothbart et al.* v. *Metropolitan Trust Co., Trustee, et al.*, 307 Ill. App. 271, the court said (at p. 278):

"Courts have gone so far as to hold that the agreement of a creditor to look solely to the trust estate rather than to a trustee personally may be implied from the facts and circumstances of a particular transaction."

(1) The Third Party With Whom the Syndicate Contracted Knew That the Defendant Exempted Himself from Personal Liability.

The defense in the instant case was that when the Syndicate purchased the Bank Stock it entered into the contract with the seller in the name of the members of the Managing Committee in their capacity as trustees and not individually; that a copy of the Declaration of Trust was given to the seller, and that the plaintiff also knew that the defendant contracted in his trust capacity and not in his individual capacity (R. 89). Therefore, no individual liability could have been imposed on the defendant, and the judgment against him is clearly improper (*Kramer* v. *Cummings*, 225 Ill. App. 26, 29; *Rothbart* v. *Met. Trust Co.*, 307 Ill. App. 271, 278).

(2) The Facts Which Were Stated in the Answer Were Conceded as True by Plaintiff's Motion.

After filing the amended answer which pleaded the knowledge on the part of the bank, the third party, of the existence of a Syndicate Agreement, and that plaintiff also

had knowledge of such facts (R. 89), defendant served notice requiring the plaintiff to admit additional facts. The plaintiff admitted the facts (R. 107-108). Plaintiff also agreed that the facts set forth in that notice be treated as another amendment to the answer (R. 108). *The facts stated therein must be treated as true on plaintiff's motion for a summary judgment* (*Zell* v. *American Surety Co.*, 138 F. (2) 461). The issues raised by the pleadings *cannot be contradicted by affidavits or by depositions*, and the judgment may only be based on the *admitted* facts (*Campana Corp.* v. *Harrison*, 135 F. (2) 334, C. C. A. 7). *Every doubt must be resolved against the movant*, and the facts set forth in the defense must be taken as true (*McIlvaine* v. *Wickwire Spencer Steel Co.*, 126 F. (2) 210; *Miller* v. *Miller*, 127 F. (2) 209, 212). The defense that plaintiff *knew* of the terms of the agreement was, therefore, admitted to be true by plaintiff's motion for summary judgment (*Clair* v. *Sears Roebuck & Co.*, 34 F. Supp. 559; *Walling* v. *Reid*, 139 F. (2) 318, 322).

The defense was (R. 98) that when the Bank Stock was bought it was paid partly by checks issued on the Syndicate account maintained in the Bank, from which the stock was purchased, which checks were signed in the name of the Syndicate by the members of the Managing Committee in their trust capacity and "not individually".* The balance of the payment was in the form of a note executed by the Syndicate and signed similarly by the Managing Committee in their trust capacity and not individually. When the Bank stock was registered in the nominee Martin for the benefit of the Syndicate, it was expressly agreed between the Managing Committee and the officers in charge of the transaction at the Bank that neither the members of the Managing Committee nor the Syndicate Members shall be individually liable (R. 99-100).

* Defendant produced the evidence at the hearing and plaintiff's attorney admitted the truth thereof (R. 107-108).

Having admitted that the *third party*, which sold the stock to the Syndicate, was possessed of the Syndicate Agreement, and that the notes which were given by the Syndicate in part payment of the purchase price, were executed by the members of the Managing Committee *in their trust capacity and not individually,* plaintiff was in no position to recover against the defendant individually. This was squarely decided in *Levy* v. *Nellis, supra,* 284 Ill. App. 228. There, the Trustees executed notes *"as Trustees * * * and not individually"*. It was sought to hold them liable individually. The court held that the words "Trustees" and "not individually" *was notice to the third party that they were not to be held personally liable.* It said, at page 236:

> "It will be remembered that the four trustees signing the notes which are the basis of this suit, signed 'As trustees under an instrument dated at Chicago, Illinois, April 10, 1926, creating the South Water Market Improvement Association, and not individually.' In *Bank of Topeka* v. *Eaton,* 100 Fed. 8, affirmed 107 Fed. 1003, the note was signed, 'as Trustees as Aforesaid.' It was held that such a note refers to the declaration of trust and the payee is bound by its provision that the trustee is not personally liable. In *Bradner Smith & Co.* v. *Williams,* 178 Ill. 420, it was held that an express provision showing that the parties agreed to act upon the responsibility of the funds alone relieved the trustee from personal liability. To the same effect is *H. Kramer & Co.* v. *Cummings,* 225 Ill. App. 26, in which the opinion quoted from *Glenn* v. *Allison,* 58 Md. 527, where it was held that where it plainly appeared from the face of the instrument that the trustee did not mean to bind himself personally there was no individual liability. This is applicable to the instant case."

The plaintiff does not stand in any better position than the *third* party with whom the defendant contracted to

purchase the bank stock as *it did not extend credit on the faith of the contract* and did *not rely* on Goldberg's alleged ownership of the stock when it made its loan (*Joseph* v. *Bates*, 133 F. (2) 457). Besides, the defense that plaintiff had knowledge of the condition of the sale and of the limited liability to the assets of the Trust (R. 89) was *conceded* by the motion for the summary judgment in accordance with the authorities above cited.

(d) Having elected to hold the defendant liable on the first inconsistent remedy, and having procured the judgment thereon, and without any cross-appeal, the plaintiff may not sustain the summary judgment on the inconsistent remedy that Goldberg was liable as trustee.

The remedy to hold the defendant liable as a "shareholder" was *inconsistent* with the remedies to hold him liable as a "partner," based on the *invalidity* of the trust, or to hold him liable as a "trustee" based on the *validity* of the trust or on a contractual obligation. The judgment, therefore, cannot be affirmed on the other *inconsistent remedy* as was done here. This was squarely held in *Commercial Casualty Insurance Co.* v. *Pearce*, 320 Ill. App. 221, *supra*. There, the court said (p. 228):

> "This claim of appellant that appellees were so personally liable is *inconsistent with the contention that they were not trustees at all,* because of the alleged *invalidity* of the trust agreement, and they were *liable as partners* under the prior partnership. Here, the complaint alleges the defendants were partners, and the case was tried on that theory. *It is now too late to claim they were trustees* and liable individually for a failure to include words of limitation of liability in the application for the bond." (Emphasis ours.)

Where remedies are inconsistent, the election of one of the inconsistent remedies is a bar to the other action.

In *Moran* v. *Union Bank of Chicago,* 352 Ill. 503, the court said:

"The Supreme Court of the United States, in *Bierce* v. *Hutchins,* 205 U. S. 340, said that an 'Election is simply what its name imports: a choice, shown by an overt act between two inconsistent rights, either of which may be asserted at the will of the chooser alone'. ***Such a choice, once manifested by appropriate words or acts, is irrevocable.*** (Bishop on Contracts, 1887 ed., sec. 808.)"

In *Chicago Title & Trust Co.* v. *De La Soux,* 336 Ill. 552, it was said (p. 526):

"The doctrine of election is based upon the assumption that two or more inconsistent and ***alternative remedies*** exist, and when a party selects one of these remedies he is precluded from prosecuting any other."

In *Sluka* v. *Bielicki,* 335 Ill. 202 (page 210), it was said:

"Where the doctrine of election of remedies applies ***the bar arises as soon as the choice is made,*** and becomes full and absolute against the other remedy at the time of the filing of the petition, declaration or claim. (*Bradner Smith & Co.* v. *Williams,* 178 Ill. 420.) This has been the rule in this State since *Herrington* v. *Hubbard,* 1 Scam. 569."

In *Glezos* v. *Glezos,* 346 Ill. 96, the court said (p. 99):

"It is ***a universally adopted principle of law*** that where a person has two or more remedies for the redress of a wrong or the enforcement of a right and these remdies are based upon ***inconsistent theories,*** such ***person is put to an election,*** and when he has, with full knowledge of the facts, definitely chosen to pursue one remedy ***he will be bound by his election.*** (*Supreme Lodge Knights of Pythias* v. *Hinsey,* 241 Ill. 384; *Garrett* v. *Farwell Co.,* 199 id. 436; *Anderson* v. *Chicago Trust and Savings Bank,* 195 id. 341; 20 Corpus Juris 5."

The statement of the court (R. 163) that it "doubted" whether the three causes of action (1) the liability as a

shareholder, (2) as a partner, and (3) as a trustee, were inconsistent because the "main question" was whether defendant was the "real owner of the bank stock", is based on a *misconception* as to the meaning of *inconsistency*. The term "inconsistency" means "mutually repugnant". The acceptance of one implies the abandonment of the other. Two modes of redress are "inconsistent" when the assertion of one involves the repudiation of the other (20 Words and Phrases, page 550). It is the "*theory*" of the recovery which *determines consistency* and not the "enforcement of a right" (*Glazos* v. *Glazos*, 346 Ill. 96, 99.) A theory that one is a "partner" is inconsistent with a theory that one is a "trustee". A theory that one is a "shareholder" is inconsistent with a theory that he is either a "partner" or a "trustee". That such theories are *inconsistent* was *squarely held* in *Commerce Casualty Insurance Co.* v. *Pearce*, 320 Ill. App. 221, 228. There, the court said that after plaintiff tried his case on the *theory* that the defendant was a "partner", it was "too late" to claim in the Appellate Court that he was liable as "trustee".

The *election of the inconsistent theory* is *not* a remedial right but a *substantive right*, and is not controlled by the Federal Rules. *Fort Dodge Hotel Co.* v. *Bartelt*, 119 F. (2) 253, 258. The Federal Rules control "pleadings" and a party may *plead* inconsistent causes, but this rule "does not affect the rule against pursuing inconsistent remedies" (2 C. J. S., p. 1059 and cases there cited in footnote 1). The rule of "election" or "choice", is not a matter of procedure but is a *substantive* right and is not governed by the Rules.* An election is a "choice" by an overt act between "two inconsistent remedies". A choice

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* At common law, a plaintiff only had one remedy (*Louisville R. Co.* v. *Raymond*, 135 Ky. 728). While a choice of a remedy between law and equity is considered a procedural matter, a choice of a position relating to a contract involves a substantive right (5 Williston on Contracts, Sec. 1527, p. 4277; 18 Am. Jur., Section 6, Page 31).

of one is *irrevocable* (*Moran* v. *Union Bank of Chicago*, 352 Ill. 503; *Chicago Title and Trust Co.* v. *De La Soux*, 336 Ill. 552, 556). The *bar* by the election "arises as soon as the choice is made."

In none of the cases which the opinion cites (R. 164) was it decided that an election made at the trial is not conclusive. All of the cases deal with "pleadings" *prior* to trial.†

Rule 54 (c) which the opinion quotes (R. 164) omitted the words "except upon default" which indicates that the words "final judgment" to which the Rule refers, relates to a *trial on the merits* and *not* to a *summary* judgment, which stands in the class of a default judgment. This Rule has no bearing on the issue of election of remedies, but relates only to "relief" and when a party elects to obtain a judgment on one inconsistent theory, it is not entitled to a judgment on another theory. At any rate the Federal Rules do not change the substantive law as to choice of remedies and the effect thereof (*Block & Yates* v. *Mahogany Assn.*, 129 F. (2) 227; *York* v. *Guaranty Co.*, 143 F. (2) 503).

The court *conceded* (R. 164) that "it is plain" that the judgment was based on the theory that the defendant was "a beneficial owner of the bank stock in proportion to the amount of his investment in the trust". Having obtained a judgment on *such a theory*, the court improperly affirmed it on the *inconsistent* theory which is not based on the pro rata investment in the trust, but on the alleged *contractual* obligation to the third party which is not based on any "investment" but on the failure to exempt himself from

† Even where the right to plead inconsistent remedies is given under a statute, the right to plead does not impair the doctrine that a party cannot pursue inconsistent remedies after the choice was made (*Bischoff* v. *Husterford State Bank*, 195 Wis. 312, 218 N. W. 353, 356).

personal liability on a *contract*. In asking the summary judgment, plaintiff's counsel stated (R. 133):

> "We have chosen the minimum liability that he pay, that he be held liable for through the investment that he made."

Here was a "choice", an "election" to hold the defendant liable *as an investor in the trust* and *not* as "trustee" on his *contract*. Having made the choice, the plaintiff is barred from seeking to hold him liable on appeal as trustee. The Illinois law was binding on the court and no Federal rules may stand in the way. (*Fort Dodge Hotel Co.* v. *Bartelt,* 119 F. (2) 253; *York* v. *Guaranty Trust Co.,* 143 F. (2) 503, *supra.*

III.

Plaintiff's Election to Take the Judgment Against the Registered Owner With Its Knowledge That He Was a Mere Nominee for Others Operated as a Release of the Defendant Under the Recent Decisions of the Illinois Courts, Contrary to the Earlier Decisions of the Federal Courts.

Even if it be conceded *arguendo* that the far-fetched theory of the plaintiff that the defendant as a "Shareholder" or as a "Partner" or as a "Trustee" was the beneficial owner of the Bank Stock, no liability can be imposed upon him after plaintiff's election to hold the registered owner, *in view of the recent decisions of the Illinois Courts.*

The liability against the defendant is not sought under Federal Statutes, but under the Illinois Constitution and its Statutes. *The construction of the Illinois Courts is, therefore, controlling on the Federal Courts,* and their earlier decisions in the absence of Illinois law must give way to the law as declared by Illinois (*Erie R. R. Co.* v.

Thompkins, 304 U. S. 64; *Stoner* v. *New York Life Insurance Co.*, 311 U. S. 464.

(a) Illinois has adopted the rule that there can be no second judgment against the beneficial owner after an election to obtain judgment against a record owner.

The opinion relies on the decision in *Reconstruction Finance Corporation* v. *Pelts*, 123 F. (2d) 503 (R. 115). Since the above decision, the Illinois courts have expressed a *different view*, and *their* views on the Illinois Constitution or Statutes are *controlling.*

In the *Pelts* case the appellant cited many decisions on the point that the liability of the beneficial owner is founded on the *agency theory*, and that such liability is *alternative*, and that a judgment against one operates as a discharge against the other. Appellant there relied on the case of *Hospelhorn* v. *Poe*, 174 Md. 242, and in holding against appellant's contention the Court said:

> "The Maryland case rests upon the relationship of undisclosed principal and agent. The *Ericson* case decided by this court relies upon *Chapman* v. *Pettus*, 269 S. W. 268 (Texas Civ. Ap., 1925), in which the Texas Court finds the relationship to be one of trustee, and *cestui que trust*, and in this relationship finds it possible to work out the liabilities between the parties equitable, and at the same time save the creditors of the Bank from the period of electing the person they shall pursue.
>
> "We think the relationship is more accurately designated as trustee and *cestui que trust*, which enables the court to reach the very satisfactory and equitable result reached in *Ericson* v. *Slomer*, 94 F. (2d) 437. We are satisfied with the law there laid down, and reaffirm it."

It was only by *a resort to the doctrine of trustee and cestui que trust where the remedies are not alternative* that the court reached its conclusion that there may be

one judgment against the registered owner and another judgment against the real owner.* When this decision was rendered, *there was no applicable Illinois law,* and the Federal courts were free to disregard the Maryland law or the law of other States.** Since this decision construing the Illinois law, *the Illinois courts have spoken to the contrary.* The Illinois courts have recently held that *the liability of the record owner and the real owner is alternative,* and that the *election* to hold the record owner operated as a *release* of the liability of the real owner. The Illinois law *refused to adopt the Federal decisions* and expressly *distinguished* between liability based *on the Federal banking law* which provides for *two separate causes*—one against the real owner and another against the beneficial owner—**while the Illinois liability is limited to one judgment as against the stockholder.**

In *Capetti* v. *Allborg, et al.,* 319 Ill. App. 143, (leave to appeal denied by the Supreme Court of Illinois in September, 1943), the *precise* question was presented—whether a second judgment may be obtained against *members of a Syndicate* subsequent to the entry of the judgment against the registered owner. The contention was made there, as it is made here, that the remedies against the registered owner and against the beneficial owner are *not alternative,* but *concurrent remedies,* and that a judgment against one does not operate as a discharge of a claim against the other. In holding *adversely to this contention* the court said in its opinion (which appears in the printed volume in abstract form only):

> **"Plaintiff's counsel argue, however, that both the record owner and the real owner of bank stock in Illi-**

* The court overlooked that there is a specific federal statute which exempts Trustees from personal liability and only in cases where there is no trust may the liability be imposed under the doctrine of agent and principal (*Rily* v. *Bondi,* 64 F. (2) 515, 518).

** This Court disregarded the agency theory in *Anderson* v. *Abbott, supra,* but it pointed out in its opinion that this applied to National Banks and that state law is controlling as to State Banks.

nois may be held liable, and decrees entered against them upon the same stock, although there can be but one satisfaction. They rely principally upon *Anderson* v. *Atkinson,* 22 Fed. Supp. 853. It seems to us to be a sufficient answer to this contention to revert to our former opinion, wherein we pointed out that the decree adjudicating Bancorporation to be the owner of 1890 shares of Englewood Bank stock was procured by plaintiffs in a cause instituted by them and that it is the decree they sought and obtained. **Having obtained that adjudication through their own initiative, they should not be permitted to obtain a decree against the numerous Bancorporation shareholders, which would be entirely inconsistent with the findings of the former decree.*** *Anderson* v. *Atkinson, supra,* the decision relied upon by plaintiffs, was one of a series of suits filed by Anderson, receiver of the National Bank of Kentucky, against the shareholders of Banco-Kentucky Company, which operated in that state. The principal suits were filed in the Federal Courts of Kentucky. *Anderson* v. *Atkinson* was a separate proceeding filed against a number of shareholders who resided in this state.

The district judge held that a suit in equity would lie against real owners of stock of an insolvent national bank, of which the stockholding company was the record owner, for an accounting as to liability on the statutory assessment on stock. In the main jurisdiction filed by Anderson the Federal courts in the following decisions held that the shareholders of the holding companies were not liable. *Anderson* v. *Atkinson,* 32 Fed. Supp. 328, affirmed in *Anderson* v. *Abbott,* 127 Fed. (2d) 696. Subsequently *certiorari* was granted by the Supreme Court of the United States from the decision reported in 127 Fed. (2d) 696, and the case was argued orally in the spring of 1943. After the court had the matter under advisement for some time, it requested further oral argument on its motion and continued the cause to the October 1943 term of the court." (Emphasis ours.)

*** This is the opposite theory upon which this Court repudiated the agency theory as to National Banks.**

In discussing further the contention that there may be a judgment against the record owner and a subsequent judgment against the beneficial owner, and in holding *contrary to such a contention,* the court further said:

> "The decision of the district judge in *Anderson* v. *Atkinson is predicated largely upon the holding in Continental National Bank & Trust Co.* v. *O'Neill,* 82 Fed. (2d) 650, and counsel for defendant point out *that the decision in the O'Neill case was based upon Federal statutes providing for two separate causes of action.* **In Illinois, however, there is only one liability, and that is fixed by the constitution against the shareholders (Art. XI, Sec. 6).** Moreover, as heretofore pointed out, the original suit at bar filed against the shareholders of the Bancorporation asked that the court 'ascertain' the stockholders of the Englewood State Bank, and the decree of December 27, 1934, ascertained and determined that very fact. *This, we think, constitutes an adjudication of the question then presented.* If plaintiffs had originally sought to fix liability against those whom they designate to be the real owners of Bancorporation, instead of the corporation itself, a different question might have been presented, but that remedy is no longer open to them. Whatever may be the ultimate conclusion of the Supreme Court of the United States in *Anderson* v. *Abbott,* **we think it will not affect the principle that after a court has ascertained and established, by its decree, the ownership of Bank stock, such questions cannot be relitigated in another suit,** especially by the same parties who secured the former decree." (Emphasis ours.)*

Under the *established law of Illinois,* therefore, plaintiff's case against the defendant, Max Goldberg, after it recovered the judgment against Martin and elected to retain the judgment, was without foundation and the court was without jurisdiction in the subject matter.

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* Here the Illinois Courts expressly repudiated the Federal theory which this Court announced in the Anderson case, and the Illinois decision, are controlling in the instant case.

(1) The Election to Take the Judgment Against Martin With Knowledge That He Was Merely an Agent and Held the Stock for Undisclosed Principals, Operated as a Release of the Alleged Liability of the Defendant.

Plaintiff *knew* prior to May 1, 1937 (R. 75) that Martin was *not* the real owner and held the stock as *agent* for undisclosed principals. The attorney for plaintiff examined the stock-book and found a notation of the Federal Securities Company. Diligence, and inquiry from the Federal Securities Company, might have led to the knowledge of the existence of the Syndicate. However, plaintiff elected to take the judgment against the agent to hold him personally liable. On June 18, 1937, plaintiff had a copy of the Syndicate Agreement in its possession. It took no action against the defendant until July 8, 1941. It did not vacate the judgment against Martin but collected over $50,000 under the judgment (R. 84).

The original complaint sought that the court should "*ascertain*" who the stockholders were and fix their liability. Plaintiff *knew* prior to the entry of the judgment against the record owner, Martin, that he was a mere nominee for undisclosed principals (R. 66). It is true that plaintiff's depositions show that the names of the undisclosed principals were not known to it until June 18, 1937 (R. 66). However, *this deposition cannot be used for such purpose in accordance with the opinion* by Mr. Justice Minton in *Campana Corp.* v. *Harrison*, 135 F. (2) 334, *supra*. Besides, it appears from the depositions that plaintiff knew prior to May 1, 1937 that Martin was a mere nominee, having told plaintiff's attorney that he was not the real owner and was holding the stock as nominee for others (R. 75). With knowledge of these facts, plaintiff elected to take the judgment against the agent and to hold him personally liable. *The remedy against the defendant, the undisclosed principal, on July 8, 1941 was, therefore,*

not available according to the latest decisions of the Illinois courts. (*Capetti* v. *Allborg*, *supra*, 319 Ill. App. 143.) The Illinois law as construed by its courts is binding on the Federal courts, notwithstanding the earlier decisions of such court to the contrary, prior to the declaration of the law by Illinois.

In addition to the fact that when the court decided the Pelts case there was no Illinois law on this subject, there is also a wide distinction between this case and the Pelts case. In the Pelts case the plaintiff *did not know* when it obtained the judgment that the registered owner was a mere nominee. It did not know that Pelts was the beneficiary. Pelts concealed that he was the beneficial owner. The election of remedies were, therefore, inapplicable when the facts were unknown. There, it was asserted that Pelts concealed from the plaintiff the fact that he was the beneficial owner. Here, the plaintiff knew that the registered owner was a mere nominee when it obtained the judgment on May 1, 1937 (R. 75). It knew that the defendant was a member of the Syndicate. There was no concealment of facts from the plaintiff. *All of the facts were known to it on June 18, 1937, when it elected to retain the judgment against Martin* (R. 75). It thereby elected to hold him liable and released the defendant.

(2) The Doctrine of Trustee and Cestui Que Trust Cannot Be Invoked to This Case Because Under the Admitted Facts the Relationship Was That of Principal and Agent.

Even if the doctrine of Trustee and *cestui que trust* be applicable to the liability of a stockholder notwithstanding the Illinois law to the contrary, this doctrine cannot be applied to a case where the conceded facts showed an "agency" and not a "trust" relationship.

The Declaration of Trust did not confer on the Trustees the right to transfer their trust to other Trustees. The

only power they had was to take the stock in the name of an *agent* (R. 48). The fact that they placed title in Martin as their agent (R. 99-100) was admitted by the motion for the summary judgment. Having established the relationship of principal and agent, the Illinois law that *the election to hold the agent operates as a discharge of the principal* is controlling (*Mussenden* v. *Raiffe*, 131 Ill. App. 456). The Seventh Circuit so held in *Bowell* v. *Newberry,* 127 Fed. 656.

In deciding in the Pelts case that the liability of the beneficial owner is not based on the agency theory but on the trust theory, the court based its decision on the Chapman case (269 S. W. 268). There, *the trust relationship was established by the evidence* while here the evidence, or the admitted facts, established an *agency*. Even the Chapman case did not base its decision on the Trust theory, but on the agency theory, for it said (p. 270):

> "But that general rule is no more settled than the specific rules that any person who holds himself out as the owner of shares, by allowing himself to appear as the registered owner on the books of the bank, may be treated as a stockholder; **that one holding stock for an undisclosed principal may be held liable as a stockholder, although in fact he is only an agent;** that although **a trustee, as such, is not liable,** yet when stock appears unincumbered in his name, **he is liable.** 1 Cook on Corp. § 253; 7 C. J. pp. 769, 770, §§ 608, 609; *Rankin* v. *Fidelity Ins. Trust & Safe Deposit Co.*, 189 U. S. 242, 23 S. Ct. 553, 47 L. Ed. 792; *Finn* v. *Brown*, 142 U. S. 56, 12 S. Ct. 136, 35 L. Ed. 936; *Kenyon* v. *Fowler*, 215 U. S. 593, 30 S. Ct. 409, 54 L. Ed. 341; *Kerr* v. *Urie*, 86 Md. 72, 37 A. 789, 38 L. R. A. 119, 63 Am. St. Rep. 493." (Emphasis ours.)

The court used the term "trustee and *cestui que trust,*" because *in that case the defense was that there existed a relationship of trustee and cestui que trust* and that under the Federal statute no such liability existed. The liability

was *not imposed* because of the doctrine of trust and *cestui que trust* but because of the *doctrine of agency*. The leading case on this subject is *Hubbell* v. *Houghton*, 86 Fed. 547, affirmed by the First Circuit in 91 Fed. 453.* In that case the *cestui que trust* defended the action on the trust theory. The Court held that the stockholders' liability is based *on the agency theory* and *not* on the trust theory. It also held that if the liability be founded on the trust doctrine *then there must be an express* or *active trust* and *not an implied one*. The Court said (p. 552):

> "In looking at the merits of the question before us, we are urged by the defendant to determine that the relations between the registered owners of this stock and the defendant are those of trustees and *cestui que trust*, and that, in no event, can a *cestui que trust* be holden for an assessment under the statutes relating to national banks. Certainly, there is no express trust here, and we perceive no elements raising an implied trust. *The registered owners of the shares had completed their duty with reference to it;* they were under no obligation to see to the proper entries of the transfers on the books of the association; and the parties are, in every sense of the word, at 'quits,' with no existing obligations or confidential relations between them, so far as this stock is concerned. Moreover, *if we were compelled to consider the proposition, we should probably hold that the statute, so far as it relates to the status of stock held in trust, concerns only express and active trusts*, where there is a probability of some estate to respond to the liability, and also that it does not apply when the records of the corporation show an unincumbered title in the alleged trustee, as is the fact at bar."

* **Appellant in the Pelts case called the attention of the court to this decision in the petition for rehearing but he did not notice then that this case was adopted as the Illinois law when it was cited with approval in *Levy* v. *Nellis*, 284 Ill. App. 228, 236, and it was not called to the court's attention that this was then the existing law of Illinois as declared by its courts.**

Here, there was not even an implied trust but a pure agency as Martin did not even cash the dividend checks but transmitted them to the Syndicate (R. 50).

In *Riley* v. *Bondi,* 64 Fed. (2d) 515, the Court cited (p. 519) the decision in *Lucas* v. *Coe,* 86 Fed. 972, on the point that the liability cannot be *defended* on a trust doctrine because *there was no express or active trust,* but simply an implied trust, *and the law of agency was applied.* A reference to these cases will show that the liability of a beneficiary of bank stock is *universally founded on the doctrine of undisclosed agency* and not on any trust relationship. At any rate the liability cannot be based on any trust relationship where the admitted facts show that there was a mere agency. The election to hold the agent operated as a release of the defendant.

There is no theory upon which the liability can be imposed on the defendant who was neither the *cestui que trust* of Martin, nor his principal and was simply one of the Trustees for the Syndicate and a member of the Syndicate. Under no theory was he individually liable.

IV.

Defendant's Answer Presented Factual Issues and the Court Acted Without Jurisdiction When It Entered the Summary Judgment.

No Summary Judgment may be entered if there are any issues of facts presented by the pleadings. Even in the construction of legal propositions relating to instruments where the court must ascertain the intentions of the parties from their acts, it is error to enter a Summary Judgment, and if there is any doubt it must be resolved in favor of the party to afford him an opportunity to be heard on the merits (*Bertlee Co., Inc.* v. *Illinois Pub. & Print. Co.,* 320 Ill. App. 490, 521).

(a) The defense of laches presented a factual issue.

The "Fourth Defense" stated the facts (R. 90) concerning the promise not to sue Goldberg in consideration of the services that he was to perform, and that he performed the services, relied on the promise and that his position had changed since 1937. Therefore, plaintiff *was estopped by silence* from 1937 to 1941, and the estoppel constituted *laches.* Its failure to even make a demand on Goldberg for four years was not explained. Even if it had offered an explanation the question of laches would have then become a *factual* issue (*Terry* v. *Prairie Oil Gas Co.,* 83 F. (2) 843; *Gray* v. *Richmond Bicycle Co.,* 167 N. Y. 348, 60 N. E. 663, 666). This point was expressly urged at the hearing (R. 131). Not only did plaintiff remain silent from June 18, 1937 to July 8, 1941, but even its counsel was silent at the hearing on this point. His only answer to the point that there were factual issues was that he "checked" the record.

The Court of Appeals affirmed the action of the trial court in denying the defendant his day in court to prove his defense on the ground of its anticipation that the defendant would be unable to produce the evidence, or that the evidence would become inadmissible.*

Appellant has no means of supplying now the evidence to this court as he was *denied* such right below. For argument's sake, suppose the defendant was able to show that in 1937, he was wholly insolvent and that had the judgment then been entered against him he could have availed himself of the benefit of the Bankruptcy Act, and thereafter begin life again. What if he was able to show, that during this delay of four years and in reliance on the prom-

* The burden of establishing the non-existence of a genuine issue of fact is upon the moving party and all doubts must be resolved below as well as an appeal against the movant (*Walling* v. *Fairmont Creamery Co.*, 139 F. (2) 318, 322).

ises not to sue him, he obtained financial aid from friends and relatives and thereby reestablished himself in business and because of this, his position was altered in that he would be called upon to pay such judgment? Besides, *the motion for the summary judgment admitted the sufficiency of the defense as well as its truth.* If the plaintiff wanted to question the sufficiency of the defense, it was its duty to move to strike it for insufficiency. When it moved for a summary judgment, *it conceded the truth and the sufficiency of the plea* and it is *estopped* to now contend that the defense was insufficient or that the defendant would be unable to produce the evidence.†

The defense of *laches* was filed pursuant to Rule 8(b). Rule 8(a)2 requires the pleader to file a short and concise statement. This was done by the Fourth Defense (R. 90) which stated in plain words that the plaintiff was guilty of laches and that the defendant had "changed his position". Even prior to the new Federal rules if a pleading contained an indefinite allegation or an insufficient allegation and the opposite party without objection proceeded to trial, the defect, if any, was waived (*Western Real Estate Trustees* v. *Hughes*, 172 Fed. 206 C. C. A. 8). A fortiori under Rule 8, the movant who demanded judgment, is in no position to contend that the defense was insufficient or that the defendant could not have sustained his defense by proof. The holding of the court (R. 169) that the defense of laches raised a "question of law rather than of fact" is not supported by any authority and is contrary to the decisions in *Gray* v. *Richmond Bicycle Co.*, 60 N. E. (N. Y.) 663 and *Terrey* v. *Prairie Oil Gas Co.*, 83 F. (2d) 843, *supra*.

† Only when there is a "legal certainty" or a "mathematical certainty" that no factual issue may be presented may a court grant a summary judgement (*York* v. *Guaranty Trust Company*, 143 F. (2) 503, 517).

(b) The ownership of the bank stock raised a factual issue.

The allegation that the defendant was the beneficial owner of the bank stock was *denied* (R. 97). This raised a *factual* issue as pointed out to the court (R. 123). This denial could not have been overcome by the deposition of Rogge because depositions are not admissible for such purpose (*Campana Corporation* v. *Harrison*, 135 F. (2) 334). Besides, there was nothing in the deposition to support the allegations that the defendant was the owner of a fractional interest in the 930 shares to the extent of 187-87/10,000 interest. The question whether there was anything due to the creditors was raised by the answer (R. 87). This was a factual issue. If the existing creditors were paid they cannot maintain any action to enforce a stockholder's liability. (*Holderman* v. *Moore State Bank*, 383 Ill. 534.) A motion for summary judgment *cannot be entertained* where there are any factual questions open for determination.

A movant is not entitled to the summary judgment unless the conceded facts show beyond any doubt that there is no defense and that the plaintiff is entitled to the relief as a matter of law. (*Sartor* v. *Arkansas Gas Corp.*, 321 U. S. 620; *Clair* v. *Sears, Roebuck & Co.*, 34 F. Supp. 559.) On a motion for a summary judgment *every doubt must be resolved against the movant* (*Zell* v. *American Surety Co.*, 138 F. (2) 461). The court cannot grant a Summary Judgment if there are disputed facts (*Miller* v. *Miller*, 122 F. (2d) 209, 212, construing Rule 56); *McElwain* v. *Wickwire-Spencer Steel Co.*, 126 F. (2d) 210. It follows that plaintiff's motion for a summary judgment should have been denied.

V.

A Court May Not Adjudicate That One Is the Actual Owner of Stock and Reserve Jurisdiction to Adjudicate That Someone Else Is the Actual Owner of the Stock.

The court clearly erred when it held that under the Illinois law a court may adjudicate that one is the actual owner of bank stock and reserve jurisdiction to determine thereafter that another is the actual owner of the identical stock. It overlooked that in *Capetti* v. *Allborg,* 319 Ill. App. 643, the court held to the *contrary.* Only under the National Banking Act where there may be *two* liabilities, one against the registered owner, and the other against the beneficial owner may a court enter one judgment against the registered owner and *reserve* jurisdiction to enter another judgment against the beneficial owner. This was the holding of the Court in the Pelts case before the decision in the Capetti case. This is inapplicable to liability under the *Illinois constitution* as said in *Capetti* v. *Allborg, supra,* for, "in Illinois, however, there is only *one* liability and that is fixed by the constitution *against the stockholders*". In that case, the court did not base its opinion on the failure to reserve jurisdiction, but on the point that *the judgment on the identical stock* that the registered owner was the actual owner *was a bar to a subsequent action* to determine that *someone else was the actual owner.*

It is elementary that when a court adjudicates that "A" is the maker of an instrument, that it is without *power* to retain jurisdiction to determine in the same proceeding that not "A", *but "B" is the maker of the instrument.* The law does not know of reservations of jurisdiction for the entry of a decree *contrary to the decree which was entered.* The Illinois law is controlling here. It is clear from the Illinois law that there is only *one* liability on bank

stock and *not two,* and the adjudication that "A" is liable is a bar to a subsequent suit against "B", and the Federal decision must yield to the State law.

VI.

The Allowance of Interest From the Filing of the Suit Is Improper Under Illinois Law.

The opinion cites *Lewis* v. *West Side Trust and Savings Bank,* 376 Ill. 23, where interest was only allowed *from the date of judgment* and *not* from the date of the filing of the suit. *This is the latest expression of the Illinois law on this subject.* It is the duty of the court to follow the "latest" decision of the highest court of the state when there is any doubt (*American Light & Traction Co.* v. *Harrison,* 142 F. (2) 639, 642, C. C. A. 7). The court *conceded* (R. 173) that there is *"doubt"* in the instant case whether interest should be payable from the date of the judgment or from the date of the filing of the suit. *It resolved the doubt in favor of the movant.* It is the duty of a court in passing on a summary judgment to *resolve the doubt against the movant.** There is no reason why the defendant should be charged with interest for a period of two years amounting to over $1,800 when it was *conceded* by the court that there was a *bona fide dispute* as to any liability.

Conclusion.

We have shown: (1) that there is no distinction in Illinois between the title to bank stock held by a corporation or by a valid trust, and between the liability of stockholders of a corporation and shareholders of trusts for Bank Stock

* The duty to resolve every doubt against the movant and in favor of the party against whom the judgment was entered is not only cast on the trial court but also on the reviewing court on an appeal from the judgment (*Walling* v. *Fairmont Creamery Co.*, 139 F. (2) 318, 322).

owned by the corporation or the trust; (2) that shareholders of a valid trust are not liable for the contracts of the trustees regardless of the fact whether there is any exemption clause in the trust agreement relieving the shareholders from personal liability; (3) that the judgment cannot be sustained on the theory that the defendant was a trustee; (4) that there were factual issues and the summary judgment was improperly entered; (5) that under the Illinois law there can be only one liability on bank stock and a reservation of jurisdiction to impose the liability on the identical stock on another is a nullity; (6) that every doubt must be resolved against the movant and in favor of defendant. It follows that the writ should be granted.

Respectfully submitted,

MEYER ABRAMS,
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Appellant-Petitioner.

SHULMAN, SHULMAN & ABRAMS,
Of Counsel.

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 440

MAX GOLDBERG, PETITIONER

v.

RECONSTRUCTION FINANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The District Court did not write an opinion (R. 138–139). The opinion of the Circuit Court of Appeals (R. 160–173) is reported in 143 F. (2d) 752.

JURISDICTION

The opinion of the Circuit Court of Appeals was filed on June 28, 1944 (R. 160–173). A petition for rehearing was denied on August 1, 1944 (R. 203). The petition for a writ of certiorari was filed September 6, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether petitioner, under the admitted material facts in this case, was one of the real or beneficial pro rata owners of the 930 shares of bank stock purchased with funds subscribed by 36 persons (including petitioner), under the terms of a Trust or Syndicate Agreement and registered in the name of a nominee who had no interest, financial or otherwise, in the stock.

2. Whether, on the facts in this case, an actual and beneficial owner of Illinois bank stock can contractually insulate himself, through a Trust or Syndicate Agreement, from the liability provided in the Constitution and statutes of Illinois.

3. Whether the judgment entered against the registered owner, in this case an admitted nominee, constitutes an election by the creditor and operates to release the real owner.

4. Whether, on the record in this case, a summary judgment was properly entered by the district court.

5. Whether the court below properly included in the judgment interest computed from the date of the filing of respondent's amended complaint against the petitioner.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Illinois Constitution and statutes are set forth in the Appendix, *infra*, p. 19.

STATEMENT

The facts as alleged in the original complaint of respondent, Reconstruction Finance Corporation (herein called "RFC") (R. 2–29), in RFC's amended complaint (R. 34–38), as admitted by Goldberg's amended answer (R. 87), and as adduced by Goldberg's answers (R. 52) to RFC's request for admissions (R. 40–49), pursuant to Rules 26 and 36 of the Federal Rules of Civil Procedure and in response to questions propounded at a deposition hearing (R. 53–61), may be summarized as follows:

RFC was a creditor of the Central Republic Trust Company (formerly Central Republic Bank and Trust Company), an Illinois state bank [1] which thereafter defaulted under its obligation (R. 22–23).

On November 19, 1934, RFC brought suit against stockholders of the bank to enforce their liability under the Illinois Constitution and statutes (R. 2–29). One Robert W. Martin was the registered owner of 930 shares of stock and was made a defendant (R. 11). On May 1, 1937, a decree was entered against Martin as such record owner for $93,000, together with costs and interest at the rate of five percent per annum from May 1, 1937 (R. 43, 52).

[1] On June 29, 1932, RFC loaned the bank $30,000,000.00 and on October 6, 1932, $50,000,000.00, which loans were evidenced by notes (R. 9). Petitioner admits that a balance still remains unpaid on the aforementioned debt (R. 41, 52).

The decree against Martin contained the following provision (Tr. 59):[2]

> In addition, this decree shall be without prejudice to any future hearing or proceeding in this cause, * * * against any or all persons who may be liable in any manner on account of shares of stock of said bank * * * which any persons at any time owned * * * and for the purpose of any such future hearing or proceeding in this cause this Court expressly retains jurisdiction of this cause.
>
> Plaintiff, with leave of this Court, may amend and supplement its bill of complaint or file such other pleadings in this cause as may be necessary, at any time hereafter, against any of the defendants in this cause or against any other persons referred to in this paragraph * * *.

Thereafter, early in June 1937 (R. 66), RFC first learned that Martin had been secretly acting as a nominee for others and that in fact thirty-six persons, who had subscribed to a certain Syndicate Agreement dated June 1, 1929 (R. 44–49), herein sometimes referred to as the "Illinois Se-

[2] By reason of the order entered by the court below on January 19, 1944 (R. 149) following petitioner's motion filed January 13, 1944 (R. 148), the decree against Martin, which was the original decree and contained the above reservation of jurisdiction, was omitted from the printed record. Accordingly, it is necessary to refer to the Original Transcript of Record as distinguished from the Printed Transcript of Record by using the symbol "Tr." preceding the page reference. The symbol "R." refers to the printed record.

curities Syndicate," or the "Syndicate," had in fact subscribed $495,000 for investment by Goldberg and two others constituting the Managing Committee of the Syndicate (R. 44).

Petitioner has admitted that:

1. The bank stock registered in Martin's name was purchased with funds of the Syndicate (R. 42, 52; Pet. 5).

2. He subscribed $100,000 or 100/495ths of the total amount subscribed by the Syndicate members for investment by the Managing Committee (R. 35, 88; Pet. 5).

3. Martin was directed by Goldberg and two others constituting the Syndicate Managers to send all dividend checks received by him on securities held by the Syndicate, for which Martin was acting as nominee, to petitioner (R. 50, 52).

4. The bank stock stood in Martin's name on the date of RFC's advances to the bank (R. 42, 52; Pet. 5).

5. RFC's notes from the bank remain unpaid (R. 41, 52).

6. All dividends paid to Martin on account of the bank stock so registered in his name were paid by him to the Managing Committee of the Syndicate (R. 42, 52; Pet. 5, 27).

7. No funds or moneys of Martin were used to purchase the bank stock so registered in his name (R. 42, 52; Pet. 26).

On July 8, 1941 (R. 34), petitioner and six other Syndicate members were made parties defendant

to respondent's original suit by an amendment to the original complaint pursuant to the reservation of jurisdiction contained in the decree of May 1, 1937 (Tr. 59).

In substance, the amended complaint, after stating the ultimate facts relating to the creation of the Syndicate and the subscription of $495,000 thereto (R. 34–35), alleged respondent's claim against petitioner alternatively.[3]

Goldberg has paid nothing on account of the liability attaching to the 930 shares of stock registered in Martin's name. His subscription, the largest of all, to the Syndicate, was $100,000 [84–85], which was 100/495ths of the aggregate amount ($495,000) subscribed to the Syndicate (R. 84). Respondent's proportionate share of the liability measured by the decree against Martin was $18,787.88, plus interest on said sum.

The hearing on plaintiff's motion for summary judgment[4] was based upon the record of this

[3] This was in accordance with Rule 8 (e) (1), (2) of the Federal Rules of Civil Procedure. The alternative allegations are in substance as follows: That Goldberg was the actual and beneficial owner of 187 8,788/10,000ths of the 930 shares of the stock of the bank registered in Martin's name [Par. 15 ii (h), R. 36]; or that the Syndicate members were copartners and as such were the actual and beneficial owners of the 930 shares of bank stock registered on the bank's books in the name of Martin [Par. 15 ii (a) to (h) incl., R. 37]; or the Managing Committee were the actual or beneficial owners, or Goldberg was the actual and beneficial owner of said 930 shares of bank stock so registered in Martin's name, as aforesaid [Par. 15 jj (a) to (c) incl., R. 37, 38].

[4] Rule 56, Federal Rules of Civil Procedure.

cause, including certain designated pleadings, depositions, admissions, and affidavits (R. 83).[5]

On December 17, 1943, the District Court entered a summary judgment (R. 138) against Goldberg in the amount of $18,787.88, together with interest on said sum from May 1, 1937, the date of the original judgment, until paid, at the rate of five percent per annum and costs. The court below affirmed, except that the decree of the District Court was modified to compute interest from July 8, 1941, the date of the filing of respondent's amended complaint against Goldberg (R. 170–173).

ARGUMENT

The decision below is correct. It is consistent with the provisions of the Constitution and statutes of Illinois (Appendix, *infra,* p. 19) and is not in conflict with apposite local decisions.[6]

1. The facts enumerated at pages 4 and 5, *supra,* represent all of the material facts involved in this case and are admitted by petitioner and establish him as one of the real, actual, and beneficial owners of the bank stock registered in the name of the nominee Martin. As such real owner petitioner is liable to RFC.

2. The Supreme Court of Illinois has declared

[5] Rule 56 (c), Federal Rules of Civil Procedure.

[6] The parties conceded in the court below that this case involved a question of local law only, and the decision below recognized that Goldberg's liability must be decided in accordance with the law of Illinois (R. 164).

that registered owners of Illinois state bank stock are liable to the bank's creditors (*Golden* v. *Cervenka,* 278 Ill. 409); that the liability is a primary one imposed by the Constitution and the statute and is read into the contract of purchase by operation of law, whenever a share of stock is bought; that the liability does not spring from any wrong or failure to observe the law (*Heine* v. *Degen,* 362 Ill. 357, 379); and that such constitutional and statutory liability will also fall upon the real owners of such stock even though they are not owners of record (*Gahagan* v. *Whitney,* 359 Ill. 419; *Hood* v. *Commonwealth Tr. & Sav. Bank,* 376 Ill. 413). It is further established by the decisions that a court will seek out and determine who the real owner is (*Gahagan* v. *Whitney, supra*).

Petitioner contends that he is liable neither as a trustee nor as a beneficiary under the Trust Agreement (R. 44–49), although he admits that he was one of three trustees named in the agreement, and that his subscription of $100,000, together with the funds subscribed by other members of the Syndicate, was used to purchase the bank stock in the name of the nominee Martin (R. 41–42, 52; 35, 88). He attempts to sustain his contentions on two grounds: first, that the bank stock was purchased with funds subscribed by members of the Syndicate and pursuant to the provisions of a Trust Agreement (R. 44–49) creating a valid trust under the laws of Illinois (Pet. 33–34); and second, that the agreement con-

tained a provision exculpating the trustees and individual members or beneficiaries of the trust from liability (R. 47). The case of *Anderson* v. *Abbott*, 321 U. S. 349, cited at pages 22–24, 32–33 of his Petition, involving as it does liability under the national banking acts, does not support his first ground, and the cases of *Martin* v. *Central Trust Company*, 327 Ill. 622 (Pet. 27–28) and *Rittenberg* v. *Murnighan*, 381 Ill. 267 (Pet. 29–31) are factually distinguishable from the case at bar, since neither of the two cases involves liability of a stockholder in an insolvent Illinois bank. The Illinois cases cited at pages 26 to 35 are not contrary to the opinion of the court below, as will appear from the following discussion.

The decisions relied on by petitioner to support his contentions that he is neither liable as a beneficiary (Pet. 33, 34) nor as a trustee (Pet. 35–49) are not in conflict with the decision below. The case of *Schumann-Heink* v. *Folsom*, 328 Ill. 321, and the other Illinois cases cited by petitioner (Pet. 35–42) do not involve facts such as exist here. Petitioner ignores his dual position as a member and trustee of a Syndicate which purchased bank stock not in the name of the Syndicate Trustees but in the name of a nominee or dummy. In the *Folsom* case plaintiff sought to hold the trustees of a Massachusetts or common-law trust liable under a contract entered into by such trustees. The contract showed on its face that the individual liability of the signatory

trustees was limited to the trust estate, and the court refused to hold the trustees personally liable since the contract negatived their individual liability. *Levy* v. *Nellis,* 284 Ill. App. 228 (Pet. 44), followed this rule. The members of a business trust were held liable as partners in the case of *In re Estate of Conover,* 295 Ill. App. 443, because there was no limitation of liability as in the *Folsom* case, and evidence disclosed that the beneficiary actively participated in the affairs of the trust.

Here the stock was registered in the name of a nominee, and it was not until Goldberg produced the Trust Agreement (R. 55–57, 77) that the exculpatory provision contained in the agreement (R. 47) was disclosed to RFC. Since the liability asserted by RFC against Goldberg was based upon the contract imposed by the Constitution and statutes of Illinois, which are read into the contract of purchase of the bank stock by operation of law (*Golden* v. *Cervenka,* 278 Ill. 409; *Heine* v. *Degen,* 362 Ill. 357, 379), and is not based upon the Trust Agreement (which is a contract between the trustees and members of the Syndicate), the escape clause, urged by petitioner, affords him no defense. This distinction is clearly established in the case of *Review Printing & Stationery Co.* v. *McCoy,* 291 Ill. App. 524 (Pet. 33), where, in a suit instituted to enforce liability against trustees of a business trust, the exculpatory provision of the trust agreement was asserted as a

defense. In refusing to give effect to this provision, undisclosed to the creditor at the time the contract was executed, the court stated (p. 538):

> In order therefore for appellees [defendant trustees] not to be liable upon the contract, *which forms the basis of this suit,* appellees must have stipulated that they were not to be presently liable, but that appellant [creditor] was to look solely to the trust estate. (Italics supplied.)

The record here is devoid of any evidence either that the liability on account of the bank stock purchased in the nominee's name was to be limited to the assets of the trust estate or that RFC had knowledge of the existence or content of the Trust Agreement on the dates that it lent moneys to the bank. Petitioner argues otherwise (Pet. 40, 42, 45, 54), but the record fails to support his contentions, as is stated in the decision below (R. 165, 166).[7] Moreover, if any doubt ever existed, petitioner

[7] Petitioner inadvertently reveals the inconsistency of his position when he states (Pet. 42) that RFC knew of the existence and terms of the Trust Agreement because: "* * * a copy of the Declaration of Trusts was given to the seller [Bank] * * *" and (Pet. 43) when he states: "When the Bank stock was registered in the nominee Martin for the benefit of the Syndicate, *it was expressly agreed between the Managing Committee and the officers in charge of the transaction at the Bank* that neither the members of the Managing Committee nor the Syndicate Members shall be individually liable (R. 99–100)." [Italics supplied.]

concedes the point when he states (Pet. 55): "All of the facts were known to it [RFC] on June 18, 1937 [RFC made the bank loans in 1932] when it elected to retain the judgment against Martin."

Petitioner cites authorities in support of his contention that it is the declared public policy of Illinois not to hold a trustee personally liable for the debts of the trust estate (Pet. 36–40). These decisions are not in conflict with the decision below but simply have no application to the issues presented here. In *United States* v. *Earling,* 39 F. Supp. 864 (E. D. Wis.) (Pet. 36), Judge Duffy, sitting in the District Court for the Eastern District of Wisconsin, held that the State of Wisconsin had authority to regulate it own banks and trust companies, and that a Wisconsin bank cannot subject itself generally to a stockholder's liability, and therefore a Wisconsin bank was not liable on Illinois bank stock registered in its name as trustee. In *Flanagan* v. *First National Bank of Chicago,* 307 Ill. App. 495 (Pet. 37), the court held that a bank is by statute a creature of limited powers and that the Illinois Banking Act gives no authority to a bank to acquire stock of another bank or to incur constitutional or statutory liability thereon, and that it would be contrary to public policy of Illinois to endanger the solvency of a bank by the enforcement against it individually of the "contingent" non-ledger liability arising from the ownership of

bank stock registered in its name as trustee. The Illinois cases cited by petitioner (Pet. 38–40) are also not in conflict with the decision below. The cases cited at pages 41–42 of the Petition show, by petitioner's quotations therefrom, either that the contracts sued upon contained a provision expressly negativing the personal liability of the signatory trustees or that the creditor had agreed to look solely to the trust estate rather than to the trustee individually.

3. Petitioner next asserts (Pet. 50–58, 60) that RFC, having taken judgment against the registered owner, is barred from proceeding against the real owner. The decree of May 1, 1937, adjudicating the liability of the record owner in the amount of $93,000 with interest and costs (Tr. 32–36, 63), at Paragraph XX reserved jurisdiction in express language against any person who might be liable on account of the bank stock (Tr. 59).

The fact that RFC had a remedy against the record owner and proceeded to enforce its remedy to judgment does not bar RFC from enforcing its separate remedy, pursuant to the reservation contained in the decree of July 1, 1937, against the real owner as long as there is but one satisfaction. The basis of liability of each, as is now well established, is different—apparent or titular ownership in one case, actual or beneficial ownership in the other. Hence, the issues involved in each case are not the same.

Reconstruction Finance Corp. v. *Pelts,* 123 F. (2d) 503 (C. C. A. 7); *Reconstruction Finance Corporation* v. *Barrett,* 131 F. (2d) 745 (C. C. A. 7); *Gahagan* v. *Whitney,* 359 Ill. 419 (see also *Anderson* v. *Abbott,* 321 U. S. 349).

Petitioner cites (Pet. 51, 62) the case of *Capetti* v. *Allborg,* 319 Ill. App. 643, and argues in effect that this decision establishes a new rule of law in Illinois which is controlling in this case. This contention is clearly a misconception of the holding in the case based upon the state of facts there existing. The *Capetti* case, reported in abstract form, is a companion case to *Trupp* v. *First Englewood State Bank,* 307 Ill. App. 258. Both the *Trupp* and *Capetti* cases, in substance, hold that where a decree is entered adjudging the liability against defendants named therein and jurisdiction is not reserved, as it was in the case at bar, the court will not permit either supplemental proceedings, as in *Trupp* case, or a new suit, as in the *Capetti* case, to relitigate ownership of bank stock.

4. Petitioner next asserts that a summary judgment was improper here, and in support of such contention urges that his amended answer presented factual issues: (a) laches (Pet. 59–60) and (b) the ownership of the bank stock (Pet. 61). He argues, in effect (Pet. 60), that when RFC filed its motion for summary judgment it admitted the sufficiency of the formal defense tendered by his amended answer, as well as its

truth, although he filed no opposing affidavits as he might have done under Rule 56 (c).[8]

The contentions made by petitioner are based upon a misconception of the purpose and effect of the motion filed under Rule 56 (c). As has been frequently and consistently held (*Fishman* v. *Teter*, 133 F. (2d) 222 (C. C. A. 7); *Fletcher* v. *Krise*, 120 F. (2d) 809, 811–12 (App. D. C.), certiorari denied, 314 U. S. 608; *Beall* v. *Pinckney*, 132 F. (2d) 924, 925 (C. C. A. 5)), the purpose of Rule 56 is to dispose of cases where there is no genuine issue of fact, even though an issue may be raised formally by the pleadings.

Petitioner complains (Pet. 59–60) that RFC delayed in filing its amended complaint against him. It is well recognized that mere delay alone, for a period less than that covered by the period of limitations, is not laches, but it is only when the delay is accompanied by some other elements

[8] Plaintiff filed its motion for summary judgment pursuant to Rule 56 (c) of the Federal Rules of Civil Procedure. At the hearing, the district court had before it the record in this cause, which included the Decree of May 1, 1937 (Tr. 26–62), the pleadings (Complaint (R. 2), Supplemental Complaint (R. 30), Amendment to Bill of Complaint (R. 34), Goldberg's Amended Answer (R. 87)), the depositions of Goldberg (R. 53) and O. John Rogge (R. 64) taken pursuant to stipulation of the parties (R. 53 and 63), Goldberg's Answers (R. 52) to RFC's request for admissions (R. 40) and Goldberg's Answer (R. 51) to RFC's Interrogatory (R. 39), together with the affidavits filed by RFC of Charles H. Albers, Receiver in this cause, and an officer of the Federal Reserve Bank of Chicago in charge of RFC's Custody Division (R. 84 and 92).

rendering it inequitable for a plaintiff to assert its rights that laches will bar the right of recovery within the statutory period. *Chicago Medical School* v. *Wilson,* 341 Ill. 170, 178–180; *Luttrell* v. *Wyatt,* 305 Ill. 274, 283. Petitioner has failed to show by facts alleged in his answer or by affidavit that his position was any different on July 8, 1941, when RFC's amended complaint was filed, from that which existed on May 1, 1937, when the decree against Martin was entered. The record on the contrary discloses (R. 59–61) that Goldberg knew of his potential liability as early as June 16, 1937. The cases cited by petitioner in support of his defense of laches (Pet. 59–60) are clearly distinguishable from the case at bar on the facts.

Petitioner has failed to establish a genuine material issue of fact as to his real ownership of a pro rata portion of the stock registered in the nominee's name. The denial in his amended answer of actual and beneficial ownership of the stock (R. 97) is contradicted by his answer (R. 52) to RFC's request for admissions (R. 40–43) and particularly Paragraphs 5 to 14 inclusive thereof (R. 41–43), wherein petitioner admitted that the bank stock registered in the nominee's name was purchased by the Syndicate with funds subscribed by himself and others and that he never transferred his interest in the Syndicate.

The argument made by petitioner as to the existence of factual issues (Pet. 59–60) ignores the

provisions of Rule 56 (c)[9] and demonstrates his failure to appreciate the logical legal inferences and conclusions which were plainly drawn by the trial court, in entering the summary judgment (R. 138–139), and by the court below in its opinion (R. 160–173). The nonexistence of a genuine issue of fact on all of the formal issues raised by Goldberg in his defense is clearly demonstrated by the record as made. Goldberg offered nothing except the conclusions and allegations of immaterial facts contained in his amended answer (R. 87, 91) as further amended (R. 97, 98–100) at the date of the hearing before the District Court (R. 102, 108).

5. Petitioner last contends that the allowance of interest was improper. The court below in its discretion concluded that the equities involved here require that there be included in RFC's judgment interest from July 8, 1941, the date of the filing by RFC of its amended complaint against Goldberg, rather than from December 17, 1943, the date of the judgment against the nominee. The cases of *Lewis* v. *West Side Trust & Savings Bank,* 376 Ill. 23 and *American Light & Traction Co.* v. *Harrison,* 142 F. (2d) 639 (C. C. A. 7), cited at page 63 of the petition, are not con-

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[9] Rule 56 (c) provides in part as follows: "* * * The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that * * * there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

trary to the decision below. The *Lewis* case involved an appeal and cross-appeal from a decree to enforce stockholders' liability. Among other points raised was the contention that the terms of the decree should have included interest from the date of either the Bank's closing or the audit which was made in connection with establishing the stockholders' liability. This contention the court overruled. The *Harrison* case involved a controversy arising under the Federal income-tax statutes and obviously has no bearing on the interest question.

CONCLUSION

The decision below is correct; it is not inconsistent with relevant State decisions; and no question of general Federal law is presented. The petition should therefore be denied.

Charles Fahy,
Solicitor General.

John D. Goodloe,
General Counsel,
Lee Walker,
M. O. Hoel,
Irving T. Zemans,
Attorneys,
Reconstruction Finance Corporation.

October 1944.

APPENDIX

Section 6 of Article XI of the Illinois Constitution of 1870 provides:

> Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors, over and above the amount of stock by him or her held, to an amount equal to his or her respective shares so held, for all its liabilities accruing while he or she remains such stockholder.

Section 6 of Chapter 16½ of Illinois Revised Statutes, 1943, provides in part:

> Every stockholder in any bank or banking association organized under the provisions of this Act shall be individually responsible and liable to its creditors, over and above the amount of stock by him or her held, to an amount equal to his or her respective shares so held, for all its liabilities accruing while he or she remains such stockholder.

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vs.

RECONSTRUCTION FINANCE CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONER'S REPLY.

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THE GUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

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PETITIONER'S REPLY.

The Questions Were Accurately Presented in the Petition and Are Inaccurately Presented by the Respondent.

Respondent did not point out anywhere in what respect the questions presented by the Petitioner are not accurately substantiated by the Record, but instead substituted different "questions presented," which are *inaccurate* and *misleading.*

The first "question presented" by the Respondent (p. 2), whether Petitioner was one of the real or beneficial pro rata owners of 930 shares of bank stock "purchased with funds subscribed by 36 persons under the terms of a Trust" and registered in the name of a nominee, is *inaccurate* and *misleading* for the reason that *at no time did 36 persons*

subscribe to the shares of stock. The 36 persons *subscribed to shares of a valid Trust* under the Illinois law, and by their subscription to the shares of the Trust, they were entitled to participate in the proceeds realized from *all* of the securities which the Trust owned to be distributed by the Trustees of the Trust whenever they would declare such distribution. The Trust owned the 930 shares, *together with other securities,* and the 36 persons were *never subscribers to the bank stock* and were neither the beneficial owners nor the registered owners thereof. The real question, therefore is, as stated in the Petition under the admitted facts, whether shareholders of a valid Trust are the real or beneficial owners of bank stock which the Trust purchased in the name of its nominee, and which it held among its other securities prior to the distribution of any of its securities to the shareholders, and whether such shareholders of a Trust may be held individually liable as alleged actual owners of bank stock, as held in the Opinion below.

The second "question presented" by the Respondent, whether an actual and beneficial owner of Illinois bank stock can contractually "insulate" himself through a Trust from the liability provided by the Illinois Constitution and Statutes, is not involved because Petitioner was never an "owner" and did *not* subscribe to bank stock, and it was, therefore, not necessary for him to "insulate" himself from any liability. Petitioner *merely became an investor in a valid Trust,* which *Trust subscribed* to the bank stock in the name of its nominee.

The questions were concisely and accurately presented in the Petition (pp. 6-8). These questions, under the admitted facts, *and the absence of any authorities to sustain the decision below,* call for a review of the decision by the issuance of the Writ.

Respondent's "Statement" Is But a Repetition of Petitioner's Statement and Is Inaccurate in One Respect.

The "statement" of the Respondent as it appears on Page 5, as to the admitted facts, is but a repetition of Petitioner's statement, but is *inaccurate* as to Point 5 that it was admitted that Respondent's note "remained unpaid." This admission was made June 4, 1942 (R. 52) but on November 24, 1943, Petitioner obtained leave of Court to file an Amended Answer, and such Amended Answer (R. 87) *denied* that there was an unpaid balance due to the Respondent and demanded strict proof and this presented a *factual* issue.

Respondent's "Argument" Is Silent on the Primary Questions Presented by the Petition, Is Evasive and Unsupported by Any Authorities.

Respondent's Brief is *silent* on the main point decided below, that shareholders of a valid Trust are individually liable for the purchase of bank stock by the Trust in the name of its nominee where the individual shareholders never received any of the dividends and the dividends were at all times payable to the Trust and where the local law adjudicated that the Trust was valid as an entity to *exempt* the shareholders from personal liability. This was discussed under Point I in Petitioner's Brief (pp. 22-34) under sub-division (a)—(1), (2), (3), (4) and (5). *Not a single authority is cited in* Respondent's Brief to sustain the decision below on this primary point and the reason is obvious. Such authorities are not to be found.

Petitioner has shown in his Brief (pp. 23, 25) that the decision below *runs counter* to the latest decision of this Court on this point, as well as to the decisions of other Circuits. The *silence* of the Respondents on this point

constitutes an *admission* that the decision is irreconcilable with the views of this Court and with the views of other Circuits.

Respondents nowhere discuss the Petition chronologically. Its argument is independently stated under five points, some of which do not even call for a reply. We will discuss them in their chronological order.

1. No reply is necessary to the statement of the Respondent that the admitted facts establish the Petitioner as one of the real, actual and beneficial owners of the bank stock. The question whether Respondent was the real, actual and beneficial owner of the bank stock can only be answered upon a consideration of the authorities dealing with the question whether shareholders of a valid Trust are the actual owners of the securities held by the Trust and that the Trustees of the Trust are not the owners, and this point which was fully argued in the Petition was not even mentioned in the Respondent's Brief.

2. It is not a fact that the Supreme Court of Illinois has declared that the statutory liability "will *also* fall upon the real owner" and even if this were true it would not overcome the other declaration of the same Court in *Hood* v. *Commonwealth Trust & Savings Bank*, 376 Ill. 413, which Respondent cites (p. 8) on the point that the question as to who is the real owner "is not a constitutional question" but is "a factual question" and is determined by the *intention* of the parties to become such owner, and when "there is no intention" to become the owner of the stock, *no statutory liability may be imposed*, as shown in Petitioner's Brief (pp. 37-40). The Illinois Supreme Court never held that the statutory liability "will *also* fall upon the real owner" but held that it will fall on the real owner. There is *no dual liability* under the Illinois authorities. There is only *one* liability, as held in *Capetti*

v. *Allborg,* 319 Ill. App. 643, quoted in Petitioner's Brief (p. 53).

The assertion (p. 8) that Petitioner "admits" that "his subscription of $100,000.00" together with funds subscribed by other shareholders "was used to purchase the bank stock in the name of the nominee, Martin" is *completely without basis* as there is no such admission and it is *not a fact.* Petitioner's subscription of $100,000.00 was *not to any bank stock* but he subscribed *to the shares of the Trust* which were issued to him and so did the other subscribers. None of them ever subscribed or purchased any of the bank stock. The bank stock was purchased by the Trustees of the Trust as an investment together with other securities and was placed in the name of its agent under the Trust Agreement. This does not make the Petitioner a subscriber to the bank stock.

Respondent seems to *concede* (p. 9) that the decision in *Martin* v. *Central Trust Company,* 327 Ill. 622, cited in the Petition in Pages 27-28, and the decision in *Rittenberg* v. *Murnighan,* 381 Ill. 267, cited in the Petition in Pages 29-31 sustain Petitioner's contention that under the Illinois law stockholders in a corporation or in a Trust are not the owners of securities purchased by the corporation or Trust, and that there is no distinction under the Illinois law between a corporation and a Trust insofar as it relates to the *title,* but it says that "neither of the two cases involves liability of a stockholder in an insolvent bank." The distinction is *fallacious* because the point involved is *not* the particular creditor to whom the party is indebted but the *principle establishing the liability* and if it is true as conceded that in those two cases the Illinois Supreme Court has adjudicated that *ownership of stock by a corporation of a Trust does not vest the ownership in the shareholders* but places the ownership in the corporation or Trust, then *it must follow as the legal consequence that*

shareholders of a Trust are not owners of the stock owned by the Trust. Not a single case was cited by the Respondent on the main proposition that shareholders of a valid Trust are liable for stock purchased by the Trust. The reason is apparent. No Court ever advanced such a far-fetched theory.

In discussing the law as announced in *Schumann-Heink* v. *Folsom,* 328 Ill. 321, on the point that shareholders of a valid Trust are not individually liable, *regardless of whether or not they exempted themselves from personal liability,* Respondent says (p. 9) that Petitioner "ignores his dual position as a member and Trustee of a syndicate" and contends that this distinguishes the *Folsom* case. That Respondent did not rely on this *dual* position when it commenced the action and prosecuted the case appears from its Complaint when *it sued shareholders who were not in such dual position* (R. 35-36). The law does not prohibit a Trustee of a Massachusetts Trust from being a shareholder.

The contention that the liability against Petitioner was based "upon the contract imposed by the Constitution and Statutes of Illinois" is without any foundation for the reason that *the Constitution did not impose any contract upon the Petitioner* and the question whether Petitioner was liable must be determined by the answer whether he was the registered or beneficial owner of the stock, and where he was neither the registered owner nor beneficial owner, there was no contract under which any liability may be imposed. The only case upon which Respondent relies (p. 10) is the decision in *Review Printing & Stationery Co.* v. *McCoy,* 291 Ill. App. 524, which was cited by the Court of Appeals. This decision was discussed in Petitioner's Brief (p. 33) and no further reply is necessary.

Respondent refers (p. 12) to the authorities cited in the Petition on the point that it is the public policy of Illi-

nois not to hold a Trustee personally liable for the debts of a Trust Estate but says that they have "no application to the issues presented here." A mere reading of the decision in *United States* v. *Earling*, 39 F. Supp. 864, is sufficient to refute this contention.

Respondent says that the decision in *Flanagan* v. *First National Bank of Chicago*, 307 Ill. App. 495, merely held it was *ultra vires* for a bank to subscribe individually to bank stock and that the issue that the liability of the bank was that of Trustee and not individually was based upon the *ultra vires* act. A mere reading of the decision will convince this Court that this is incorrect.

Respondent contends (p. 13) that the decisions cited in the Petition at Pages 38-40 are not in conflict with the decision below. This is but a bare statement. The decisions that were cited there, are on the point that the question as to "who is a stockholder" is *not* a *constitutional* question but is a *factual* question. At Page 39, we cited the Illinois decisions on the point that the question whether one is an owner of stock is a question of "intention" and "*no presumption arises*" that a person intended to become the real owner of the stock by the fact that he became either Executor or Trustee. These decisions are squarely *in conflict* with the decision below, and Respondent has not shown how they can be reconciled with the decision in the instant case. The bare statement (p. 13) that the cases cited at Pages 41-43 of the Petition are distinguishable does not establish that they are distinguishable.

3. It is unnecessary to burden this Court with a reply to Point 3 which was fully discussed in Petitioner's Brief (pp. 49-58) and we have shown that the decisions of the Federal Courts do not apply to the liability under the Illinois Constitution because of the recent decisions of the Illinois Courts which are controlling.

4. The question whether there were factual issues in the case which deprived the Court from entering a summary judgment was fully argued in the Petition (pp. 59-62), and the comments of the Respondent do not deserve a reply.

5. We will not burden this Court with a further discussion on the point that when the Court of Appeals reversed the trial Court as to the allowance of interest from May 1, 1937, it was its duty to exclude the interest not only to the date when the action was commenced but to the date when the judgment was rendered, as this was fully covered in the Petition (p. 63).

Conclusion.

The Brief of the Respondent must be treated as a *confession* that there is no authority to support the decision in the instant case, as no authority is cited to sustain the decision which impells every investor in Trusts to the danger of personal liability for bank stock which the Trust might have purchased among other securities and which it may hold in its portfolio. *It runs counter to the principle of limited liability and undermines the whole structure of investment Trusts.* It is in the teeth of the decision of this Court in *Abbott* v. *Anderson, supra,* which *distinguished* a valid Trust from a bank-holding corporation and is *in conflict* with the Illinois decisions as well as with the decisions of other Circuits. This decision should not be allowed to stand as the law, and the Writ should be issued.

Respectfully submitted,

Meyer Abrams,
Attorney for Petitioner.

Shulman, Shulman & Abrams,
Of Counsel.

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PETITION FOR REHEARING.

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PETITION FOR REHEARING.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

In petitioning for a rehearing from the denial of certiorari in this cause, petitioner realizes that such a rehearing is unusual. However, this is an *unusual* case. Ordinarily a petitioner has his day in the trial court and a review in the Court of Appeals. In the instant case, petitioner did *not* have his day in the trial court because the District Judge granted a *summary* judgment upon his *assumption* (R. 118) that the decisions of the Seventh Circuit in *RFC* v. *Pelts*, 123 F. (2) 502 and *RFC* v. *Barrett*, 131

F. (2) 645, holding that the "beneficial owners" are liable together with the "registered owner," warranted a judgment for the plaintiff although it was *denied* by the Answer (R. 88) that petitioner was *ever* a beneficial owner. The Court of Appeals did *not* affirm the Judgment on the decisions on which respondent relied (R. 115) and on which the Court *based* its Judgment (R. 118) but upon a theory which it advanced for the *first* time in its Opinion (R. 167), which was not *even raised* by the respondent. This theory that there is a "marked distinction" in Illinois between "ownership" of bank stock by an Investment Trust and the ownership thereof by a Corporation so that shareholders of a Trust *are* "owners" of the bank stock which the Trust held, while shareholders of a Corporation are *not "owners"*, is *not* supported by *any* authorities. It *runs counter* to the decisions of this Court as well as to decisions of other Circuits, and of the local law which is controlling.

Petitioner feels that a great injustice was done when he was adjudicated to pay, under the modified Opinion, $18,-787.88 plus interest at 5% from July 8, 1941, as a beneficial owner of bank stock of which he was *neither the actual nor beneficial owner.*

The denial of certiorari in this case was perhaps due to the *misleading* statement of respondent in its Answer to the Petition (p. 2) that the question presented was whether petitioner "was one of the real or beneficial pro rata owners of 930 shares of bank stock purchased with funds subscribed by 36 persons, under the terms of a Trust or Syndicate Agreement and registered in the name of a nominee." The record *does not present such a question.* None of the 36 persons *ever subscribed* or purchased any of the bank stock and there was no such allegation in the Complaint. The Complaint alleged (R. 35(6)) that "on various dates . . . various persons subscribed to said

Agreement'' and "paid'' to the Syndicate or Trust the sum of $495,000.00 and the "Managing Committee'' or the Trustees purchased the bank stock for the Syndicate. It also alleged (R. 35(e)) that the petitioner and the other persons "subscribed for the respective fractional parts of said Syndicate'' and "paid'' the "Syndicate'' for their subscriptions. The 36 persons *invested approximately one half million dollars* in a valid Investment Trust which Trust purchased the bank stock, among other securities. The bank stock was *never distributed to the shareholders* of the Trust nor were dividends ever distributed to them, but were paid directly to the Trust. They were not entitled to, nor could they demand distribution.

The *real* question which this record presented was: Whether shareholders of an Investment Trust which purchased bank stock in the name of its nominee and kept it in its portfolio among other securities are owners of the bank stock prior to any distribution or segregation of the securities among the shareholders? The Court of Appeals held that the shareholders of the Trust are the "owners'' of the bank stock and *not* the Trust. Its decision *cannot be reconciled* with the decision of this Court in *Anderson* v. *Abbott*, 321 U. S. 349, where it *distinguished* the "Banco'' from an "Investment Trust'', saying (p. 358):

> "It was in *no true sense* comparable to *an investment trust* or holding company, *which holds bank stock in a diversified portfolio.*'' (Italics ours.)

The decision also runs counter to the decision of the Sixth Circuit in *Laurent* v. *Anderson*, 70 F. (2d) 819, where the Court said, at page 822:

> "We may assume that *in the case of a strict trust*, in absence of a Statute of an express agreement to the contrary, the Trustee—and *not the beneficiary* is liable for individual liability against stockholders.'' (Italics ours.)

The decision is also not in accord with the Opinion of the Fourth Circuit in *Nettles* v. *Childs*, 100 F. (2d) 952, as shown in the Petition (pp. 29, 32).

The decision holding that petitioner was liable as a "shareholder" for the *contract* of the "Trustees" is in *conflict* with the holding in *Taylor* v. *Davis*, 110 U. S. 330 that a Trustee *cannot bind the beneficiary* to make him liable on contracts made by the Trustee because a Trustee is *not* the agent of the Cestui que Trust. This Rule was adopted in Illinois in *Schuman-Heinck* v. *Folson*, 328 Ill. 325, 329, which held that "when a Trustee contracts, he does so for himself. He has no principal." This is the *universal* Rule (3 Bogert on Trusts, Section 712).

The Seventh Circuit affirmed the Judgment below because (R. 167) the "legal title" was in the Trustees and the "equitable title" was in the "shareholders" and they were, therefore, the beneficial owners of the bank stock. Its decision was *contrary* to the decision in *Babcock* v. *Chicago Ry. Co.*, 325 Ill. 16, 30, where the *distinction* between shareholders in a Trust and shareholders in a corporation was not recognized, the Court saying (p. 30):

> "A Trustee * * * is vested with the legal and equitable title subject only to the provisions of the Trust."

The Opinion is also *irreconcilable* with the latest decision of this Court in *Anderson* v. *Abbott*, 321 U. S. 355, where this Court said, at page 361:

> "Limited liability is the rule, not the exception."

There was no exception here to the rule because the Trust was *not* organized for the purpose of transferring bank stock from individuals to the Trust for the purpose of escaping personal liability. None of the "shareholders" were owners of the bank stock at the time and the bank stock was purchased by the Trust among other securities in which the subscribers to the shares in the Trust invested approximately a half a million dollars.

The decision of the Illinois Supreme Court in *Martin* v. *Central Trust Co.*, 327 Ill. 622, holding that the shareholders of a corporation are *not* owners of the stock which the corporation owns in other companies (followed in *Harris* v. *Chicago Title & Trust Co.*, 251 Ill. App. 257, 260), and the decision in *Rittenberg* v. *Monahan*, 381 Ill. 267, on the point that shareholders in a Trust are *not* the stockholders of the corporation which the trust owns, *cannot* be reconciled with the decision in the instant case.

The new theory advanced in the Opinion that shareholders of a valid Trust are liable to creditors who did not know that by the terms of the Trust the shareholders were exempt from individual liability can find no support in any case. The principle exempting shareholders of a Trust from liability *is not based* on the exemption clause contained in the Trust Agreement but on the *pivotal point* whether the Trust is *valid*, or *invalid*. If valid the shareholders are exempt from liability. If invalid, they are considered "partners" and are liable. This was more strikingly pointed out in the decision in *Roberts* v. *Syndicate*, 198 N. C. 381, 384, which commented on the effect of the decision in *Schuman-Heink* v. *Folsom*, 328 Ill. 325.

The Seventh Circuit evidently recognized the *weakness* of its decision when it sought to affirm the *summary* judgement on the ground that if shareholders of a valid Trust are not the shareholders of the securities of the Trust, then the petitioner as a Trustee was liable because he did not exempt himself from personal liability. It recognized in its opinion that the judgment that the petitioner was liable for the *pro rata* amount of his investment in the Trust *cannot be reconciled* with a theory that he was liable as Trustee because the liability would have been for the full amount. Having asked for a summary judgment on the theory that petitioner was liable as the *pro rata* owner

of the 930 shares and having secured the judgment on such a theory, it could not obtain an affirmance on a liability which was "determined upon different principles and measured by a different standard" (*Wrigley & Co.* v. *Larson & Co.*, 5 F. (2d) 731, 742). It failed to take notice of its own decision in *Roschek* v. *Williamson*, 142 F. (2d) 542, that one cannot obtain a judgment on one theory and seek to sustain it on the opposite theory. It failed to follow the Illinois law which is *directly* in point (*Commercial Casualty Ins. Co.* v. *Pearce*, 320 Ill. App. 221) where, after deciding that the Trust was valid and that the defendant was *not* liable as a *partner*, the appellant claimed, as here, "that the failure to include words of limitation of liability" made "the Trustees personally liable" and in holding *against* the contention, the Appellate Court said (p. 328):

> "Here, the Complaint alleges the defendants were *partners* and the case was tried on that theory. It is now too late to claim that they *were Trustees* and liable individually for failure to include words of limitation of liability in the application for the bond."

Seldom can a case be found to be on all fours as is this case. Had the respondent alleged such a cause and tried the case on such an issue, petitioner would have been in a position to meet the issue. However, *no such allegation was made* and the *summary* judgment was *not* based on such a theory. Respondent's case was founded on the theory that petitioner owned 930 shares as a "*partner*" (R. 37(h)). The Opinion squarely held that the petitioner was *not* a partner as this was a "valid Trust" (R. 164). Respondent also inconsistently alleged that petitioner was *not* a partner but a member of a Managing Committee under a Syndicate Agreement and as such *he was a beneficial* owner of the "*assets*" *of the Trust*. It was not alleged that as Trustee or a member of the Manager Committee he was liable on a contract which he made and did

not exempt himself from. It is evident that *under no stretch of the imagination* could such a pleading be considered as an allegation that the defendant as Trustee was liable because he did not exempt himself from personal laibility. No such theory was advanced and the trial court did not enter summary judgment on such a theory.

If petitioner had had his day in Court on a trial on proper allegations, he would have been able to show by *parol* evidence that he never contracted with the respondent and that the respondent *knew* of the exemption contained in the Syndicate Agreement. He would have also been in a position to point out to the Court that the entire proposition that the petitioner did not exempt himself from any liability in making a contract is *fallacious* because there was *never any contract* between the petitioner and the respondent. At best, *there was a contract between Martin* who subscribed for the shares, *and the respondent.* Stock is considered *negotiable* paper under the Uniform Transfer Act (*Priess* v. *Acme Massive Terrazzo*, 309 Ill. App. 475, 479). Only the *person whose signature* appears on a negotiable instrument *is liable*, even though he signs the instrument for the *benefit* of another person. This was squarely held in *Shiel* v. *Chicago Title & Trust Co.*, 262 Ill. App. 410, which is also cited in an abstract decision in a case where counsel for this petitioner represented the plaintiff, *Braverman* v. *Terril Bond & Mortgage Co.*, 272 Ill. App. 603, and certiorari was denied here (292 U. S. 600). There, the trial court held that where a person entered into a contract and fraudulently concealed that he was a "dummy" the third person was liable as the beneficial owner, and a decree was entered against such beneficial owner. The Court of Appeals *reversed* it on the ground that *only the person whose name is subscribed to a negotiable instrument is liable* and he is the

only contracting party. The Court pointed out that it is the frequent practice among business men who do not want to involve themselves in personal liability to employ a nominee to enter into a contract and that under the Negotiable Instrument Law, such a person cannot be held liable.

A fortiorari here where nothing was concealed from the respondent who was not even a creditor at the time. Martin being the nominee for the Syndicate, and later *might be considered the beneficial owner.* Under no theory could the petitioner be held to be the "beneficial owner," and the failure to exempt himself from liability on a contract cannot be applied *to a contract to which he was not a party.* At any rate, the cause of action because of failure to exempt himself from personal liability by virtue of the contract, was *not a*lleged and *never asserted.* It came as a surprise when this theory was advanced by the Court of Appeals. Because of the *character* of the judgment, and the nature and decision on review, petitioner did not have his day in Court.

In view of the fact that the decision in the instant case is *not in harmony* with the decisions of this Court, is in *conflict* with the decisions of the Fourth and Sixth Circuits, and in view of the fact that it *failed to follow the local law,* Petitioner believes that this Court erred in not granting the Writ of Certiorari, and that a rehearing should be granted and the Writ should be issued.

Respectfully submitted,

Meyer Abrams,
Counsel for Max Goldberg, Petitioner.

Certificate of Counsel.

The undersigned, Meyer Abrams, counsel for Petitioner, Max Goldberg, hereby certifies that he has prepared the foregoing Petition for Rehearing and is of the opinion that it is well founded in point of law, and is not interposed for purposes of delay.

Meyer Abrams.